IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI

SC 35/2018
[2018] NZSC Trans 16

BETWEEN **MARK ROBERT SANDMAN**
Appellant

AND **COLIN CHARLES McKAY**
ROGER DAVID CANN
DAVID JOHN CLARK
Respondents

Hearing:	12 November 2018
Coram:	Elias CJ Glazebrook J O'Regan J Ellen France J Arnold J
Appearances:	R M Dillon for the Appellant P J L Hunt and J Heard for the Respondents

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CIVIL APPEAL

MR DILLON:

Dillon appearing for the appellant, Your Honours.

ELIAS CJ:

Thank you.

MR HUNT:

May it please the Court, Hunt appearing with Mr Heard for the respondents.

ELIAS CJ:

Thank you, Mr Hunt, Mr Heard. Yes, Mr Dillon.

MR DILLON:

Thank you, Ma'am. Just some minor housekeeping matters. I see the physical bundle of the case omitted page 93 although I understand it was included in the electronic version. I have some…

ELIAS CJ:

What is it?

MR DILLON:

It is the first page of an affidavit by Mr David John Clark. It may not be of any particular relevance.

GLAZEBROOK J:

Where is it, sorry?

ELIAS CJ:

Well, perhaps you could just – page 93. Perhaps you could just pass it in and we can add it to our hard copy.

MR DILLON:

Yes. I have six copies of that. I've –

ELIAS CJ:

Because I should say that I read all of this electronically but I haven't brought the electronic version into Court so I might need some assistance in locating stuff.

MR DILLON:

And my friend indicated that there seemed to be some omissions from the electronic copy but I'm not aware of what those ones were.

ELIAS CJ:

There was. Well, there was an omission of the undue influence page of the statement of claim.

MR DILLON:

Very well. This will ensure that we've got at least one –

GLAZEBROOK J:

I think that's in the physical one.

ELIAS CJ:

I don't know whether it is or not. I've seen it.

GLAZEBROOK J:

I've certainly seen it but…

ELIAS CJ:

I think it was in the scanning there and was made…

MR DILLON:

So I have the extra page 93.

ELIAS CJ:

You just have one copy, do you?

MR DILLON:

No, I have six copies.

ELIAS CJ:

Thank you, that's good.

MR DILLON:

I also have prepared an oral outline of submissions which I've printed up that it's not a formal memorandum, rather a list of bullet points, and again I have six copies of that. And finally one document that may be relevant should be on the Court record but might not be before you today, and that is the appellant's submissions on the application for leave to bring the appeal. That has got attached to it the order in the related proceedings that allows both proceedings to be heard together when it comes on substantively. Now obviously it was filed. It will be on the Court file, but I don't know whether it's in front of Your Honours today and I also have additional copies of that.

GLAZEBROOK J:

I've got a copy.

MR DILLON:

And it's probably part of the electronic.

O'REGAN J:

Are you going to hand us up a copy?

ELIAS CJ:

Mr Registrar, would you just get – and also the submissions. Before you get under way I should flag that I'm not really clear as to why the argument has proceeded on the basis of knowing assistance in breach of trust because your pleadings seem to me to claim a direct liability to the plaintiff and indeed the Court of Appeal made some mention of the fact that there – so not accessory liability but direct liability, presumably on the – and a claim to recover loss suffered as a result which seems to me more in the *Ross v Caunters* [1979] 3 All ER 580 and *White v Jones* [1995] 2 AC 207, and I can't remember the name of the New Zealand case.

GLAZEBROOK J:

Gartside v Sheffield, Young & Ellis [1983] NZLR 37.

ELIAS CJ:

Gartside, yes.

MR DILLON:

Well, the plaintiff in the High Court you'll see from the statement of claim commenced the proceeding in his own name. Obviously he had assistance and the pleading issue has been raised by my friend a number of times in the sense that saying that it is not clearly pleaded as a matter of…

ELIAS CJ:

There's a heading, "Knowing Assistance," which may have influenced the prism within which this was looked at, but I was looking at it in terms of the pleading of dishonesty and it struck me that on the approach that's pleaded it wouldn't have been necessary to plead dishonesty which is why I wondered whether – because it doesn't seem to be an accessory liability that is being pleaded. It's a direct liability to the plaintiff.

MR DILLON:

I have a little difficulty just putting that in context in the sense that if a plaintiff comes before the Court pleading knowing assistance, that is a claim.

ELIAS CJ:

Well, that's a label and it's a label of law actually which doesn't have to be pleaded. I'm looking at the substance of what is pleaded.

GLAZEBROOK J:

Perhaps, I just wonder whether it would be helpful to say that what is pleaded seems to be that the will was made when the solicitors knew that the testatrix was incompetent and/or alternatively knew that she was subject to undue influence. I don't know if that is helpful in…

ELIAS CJ:

And that therefore the defendants are liable to the plaintiff for loss. That seems to be what is pleaded.

MR DILLON:

Yes, the knowing assistance, quite apart from the heading, is specifically pleaded in paragraph 24 of the claim.

ELIAS CJ:

Sorry, I'd just better turn it up. Sorry, what page is it at?

MR DILLON:

Page 23 of the case and it's paragraph 24, and I can indicate that it is Mr Sandman's case that effectively the will that was probated was a will that was influenced and designed by his sister, Vicky, albeit not exactly for her benefit but rather to deprive Mr Sandman of his benefits given that Vicky knew she was about to die, and in that context Mr Sandman's view was that the firm assisted Vicky in achieving that outcome with knowledge of Mrs Sandman's vulnerabilities, and that's the context for pleading the knowing assistance. It was Vicky's relationship with her mother and also Mr Giboney who was assisting Vicky, the steps that they took to achieve the outcome of this new will being executed was what the plaintiff contends was the relevant trust relationship as between Vicky/Mr Giboney and Mrs Sandman that the solicitors knowingly assisted in the breach of that relationship by facilitating the execution of actually a series of documents. There was a will in this proceeding. In the related proceeding there were two powers of attorney. There was also the statutory declaration that was prepared for the purposes of justifying the will. So to that extent it's assisting parties with a knowing, a known relationship with the testatrix to achieve an outcome that suited those parties.

ELIAS CJ:

So what is it? A knowing assistance of other parties who act in breach of trust. You're content to leave it on that basis, are you?

MR DILLON:

Your Honour has raised issues that could be explored further with Mr Sandman –

ELIAS CJ:

Well, no, I don't want you to explore further. I just really want you to tell me what the basis of the claim is and if it is an accessory claim only, that is assistance in a breach of trust by Vicky and the other person who had the EPO, was it?

MR DILLON:

Yes, Mr Giboney.

ELIAS CJ:

Yes. On that basis then, you know, you're nailing your colours to that mast. Is…

MR DILLON:

My friend has been careful to ensure that it's the pleadings that are before the Court at each level and the pleadings do only plead knowing assistance.

ELIAS CJ:

Well, you don't have to plead law. So it is really just a question of what facts are you relying on, but you're saying that you are relying on – you're only trying to claim that the defendants assisted in a breach of trust by Vicky and/or the other person who had the EPO. Is that right?

MR DILLON:

I can feel this corner being slowly painted in but…

ARNOLD J:

Well, is the Court of Appeal correct at paragraph 39 where it describes the essence of your claim? Look at page 292 of the record, paragraph 39.

O'REGAN J:

Volume 4.

MR DILLON:

So 292.

ARNOLD J:

292 at 39. So the basic case is that Vicky and Mr Giboney held the EPOAs. They owed fiduciary duties to Mr Sandman. They breached them. Sorry, those parties, Vicky and Mr Giboney, breached them and the firm assisted in that breach and your client suffered loss as a consequence. Is that it?

MR DILLON:

That does reflect what the pleadings have pleaded against the firm, yes.

ELIAS CJ:

You accept that that is what the case was?

MR DILLON:

That's what the case – and how it was argued before the Court of Appeal, yes.

ELIAS CJ:

So then it seems to me if that is the basis of the case then you're faced with the fact that the pleadings don't distinctly plead and give particulars of dishonesty which is, as you acknowledge, an ingredient of the claim that you're bringing and in your written submissions you haven't addressed the respondents' really primary argument which is cased on striking out rather than summary judgment and I would be assisted if you would tell me why striking out isn't appropriate if you're not, if you haven't pleaded dishonesty and given particulars of it.

MR DILLON:

It's respectfully submitted that the pleading at paragraph 24 is the context around which the facts that are pleaded revolve and the paragraph 24 pleading of knowing assistance is certainly a legal pleading and to establish knowing assistance dishonesty of at least one of the various levels have to be established in order to establish knowing assistance. So it's respectfully submitted that by pleading that and setting out the facts in quite some detail in the –

GLAZEBROOK J:

So which of the facts do you rely on then for dishonesty?

MR DILLON:

That perhaps could best be addressed by reference to the summary of the oral submissions.

ELIAS CJ:

Well, this really is a pleading point.

MR DILLON:

It is.

ELIAS CJ:

This is a preliminary matter. I know for, with summary judgment we do take in evidence but at the moment what you're being asked about is the pleading.

MR DILLON:

I appreciate that. But the question was in relation to what has been pleaded where is the dishonesty and that really is a matter of putting all the facts together to come to a conclusion that on those facts it was dishonest to assist in the creation of these documents and the facts that are relied on really appear under the (iii) of that summary of oral submissions, most of them being admissions made by the firm in the primary affidavit that they've relied on, that of Mrs Paul, and if I could just – it's not really the pleading when we go to the evidence but the pleading is of this evidence and it may assist if we go through the various elements of it to see how it comes together with a conclusion that this conduct must in total raise so many questions as to dishonesty that it would be inappropriate to have either struck it out or to have issued summary judgment against Mr Sandman.

ELIAS CJ:

Well, is your submission that if the lawyers knew that Mrs Sandman didn't have testamentary capacity or if the lawyers knew that she was being unduly

influenced, both of which you have pleaded, that would have to amount to dishonesty. Is – that's your submission?

MR DILLON:

Indeed, to, in that context to perform the functions of the lawyer, to draft the documents and have them executed with that knowledge was dishonesty in the Eden Trust type level of a solicitor who perhaps was wilfully blind as to asking the relevant questions but I mean this is, particular facts of this case involve the solicitors obtaining a medical certificate which implicitly means that in their view one was necessary but the medical certificate they obtained is from a doctor who by the time the will is executed had seen the client some three months previously and that's just one aspect of the context in which the will and the powers of attorney and the statutory declaration were all executed. The oral submissions, the summary of them, sets out a series of effectively rhetorical questions but the answer to each of the questions is that this particular incident is yet another incident where proper questions were not being asked.

ELIAS CJ:

Well, in this oral outline do you answer the respondents' argument on strike out because it's not in your written, primary written submission?

MR DILLON:

The strike out issue was regarded as a subsidiary one to the summary judgment issues so it was treated perhaps with less rigour than it perhaps warranted given the questions that Your Honour is addressing this morning.

ELIAS CJ:

Well, even if you succeed on summary judgment and summary judgment was inappropriate you still face, you still face the strike out application that was heard but hasn't been resolved. It may be that it can't be resolved here and that it has to go back, but are you not in a position to develop the argument on strike out if you succeed on summary judgment?

MR DILLON:

If summary judgment is set aside and strike out remains an issue that raises a question of whether the pleadings can be amended in a way that makes it perhaps bold, underlined and italicised as to exactly where the dishonestly arises and that is something that would be available to the plaintiff applicant on the basis that the submissions in relation to summary judgment go to some trouble to show how those elements compound on each other to reach the position where by the time that the key documents are actually executed the solicitors apparently are wilfully blind as to questions that should be asked. Even on the day of execution the existing case law which is set out both in the formal submissions and in the outline indicated that there should have been questions asked about Mrs Sandman's capacity, knowledge of what the day was, who the Prime Minister was, those sorts of general questions to establish her capacity at the time she executed. Nothing like that did occur.

O'REGAN J:

But that's your case for getting the will set aside, isn't it? That's – I mean you seem to be confusing two different things. Your primary argument is that it's not a valid will.

MR DILLON:

Indeed but in –

O'REGAN J:

But that doesn't make the lawyer involved in preparing it guilty of dishonesty.

MR DILLON:

At the point of execution there's questions even as to who gave the instructions in relation to the will.

O'REGAN J:

Well, are you saying the lawyer had a conflict of interest because they owed a duty to your client and to the testator, testatrix?

MR DILLON:

That is an additional element if – given that they're aware of Mr Sandman's position under the old will, Vicky's position, somebody who had only weeks left to live which is known to both Vicky and to the solicitors, and Mrs Sandman's position as a vulnerable person and the firm was acting for Mrs Sandman and for Vicky with knowledge of Mr Mark Sandman's position under Mrs Sandman's existing and perfectly valid will which I think was 2005.

O'REGAN J:

So you're saying merely by helping Mrs Sandman make the will the firm was acting dishonestly because Mr Sandman – or are you saying the firm had something else?

MR DILLON:

Helping, helping Vicky to present a document in front of Mrs Sandman for her to execute in those circumstances was the breach of the duty.

ELIAS CJ:

I had understood from your answers to my questions earlier that you are not pursuing a direct claim on behalf of the plaintiff against the defendants. It's simply an accessory claim. Well, what is – yes, an accessory claim.

MR DILLON:

Accessory liabilities, yes. My answer just then were to the conflict of interest issue which is a gloss to some of the factors that were operating at the time that the will was – appeared. That is not part of the pleadings but it does again create a particular context in which these various steps were being taken and it's quite clear from the evidence submitted by the firm that the firm was aware both of Mr Sandman's position under the old will and that he was querying the steps that he became aware were being taken by writing a letter to the firm asking quite what was going on and getting a reply and that evidence is – this – his letter's actually produced. It's in the case and the answer to him appears in the case.

In relation to the summary judgment application the key issue is the question of the knowledge of the firm in relation to Mrs Sandman's incapacity. In this case we have the relatively unusual position of a finding of hearsay in relation to evidence that Mr Sandman had attempted to place in front of the Court and that excluded evidence details the medical evidence quite extensively and also links that medical evidence to the knowledge of the firm.

In relation to the medical evidence, being the appropriate place perhaps to start, in this proceeding Mr Sandman's second affidavit, which appears in the case at page 90, refers to two of his own affidavits filed in the related proceeding. So he's filed an affidavit that says, "Here are my previous statements in this related proceeding which I seek to rely on in this proceeding." The first of those affidavits filed in related proceeding contain the medical records of Mrs Sandman which –

ELIAS CJ:
I haven't checked, others probably have, the related proceedings. Have we got the pleadings in front of us for those?

MR DILLON:
I don't believe so, no.

ELIAS CJ:
No. I've assumed that one's a family protection claim.

MR DILLON:
It was a – it started as a proceeding filed in the Family Court because it was attacking the enduring powers of attorney.

ELIAS CJ:
Yes. I see.

MR DILLON:

And that was moved to the High Court and that's referred to in Mr Sandman's application that by the time he filed his affidavit it had been removed to the High Court.

ELIAS CJ:

Yes.

MR DILLON:

And subsequent to that there was an order in that proceeding that both proceedings be heard together because it was all about the capacity of Mrs Sandman at the time she executed –

ELIAS CJ:

Be heard together. Yes. So what's the other proceeding? Is there a – there's a further one, is there? Or is there – there's just the one?

MR DILLON:

No, no, there's just those two.

ELIAS CJ:

I see, thank you.

GLAZEBROOK J:

There may not be a statement of claim as such if it started in the Family Court.

MR DILLON:

That's correct. There's an application for directions and/or orders in relation to the power of attorney document.

ELIAS CJ:

Yes, yes. No, that's all right. I just wasn't sure whether there was a claim like a family protection claim or a testamentary promises claim but it's not. It's simply a challenge to the enduring power of attorney.

MR DILLON:

Yes, that's correct.

ELIAS CJ:

Yes.

MR DILLON:

The challenge effectively is that the documents are not viable because she didn't have testamentary capacity at the time she signed them and also seeking to account for the people that were acting as attorney, both before and after that those documents were created which raised some interesting jurisdictional problems in itself and it's that proceeding that's been transferred to the High Court and as a result of that transfer subsequently an order has been made that both proceedings be heard together and the relevance of the document, the application for notice to leave, for leave to bring the appeal that was handed up just to make sure the Court had it in front of it, you'll see next to the back of that are the submissions or a memorandum seeking the joinder and the very last page is notice from the Court of the order that the proceedings are to be heard together.

O'REGAN J:

But it doesn't join them together, does it? It just says they're here, heard.

MR DILLON:

Heard together, yes, and the order that they be heard together it's submitted has particular effects in relation to the third party affidavits that Mr Sandman annexed to one of his affidavits in this proceeding because those third party affidavits were filed in the related proceeding. That proceeding will be heard together with this proceeding. Those deponents to those affidavits are available witnesses who can be called and be cross-examined in relation to the contents of their affidavits and –

O'REGAN J:

Well, except the respondents aren't parties to the other proceeding, are they?

MR DILLON:

Well, that in itself is also rather an interesting issue in that they have been party to the other proceeding and that can be seen…

O'REGAN J:

Are they a party at the moment?

MR DILLON:

They were a party to that other proceeding for the purpose of some discovery orders and filed a notice of intention to appear.

O'REGAN J:

Well, let me ask you a different question. Will they be able to cross-examine these witnesses at the other proceeding?

MR DILLON:

Given that the proceedings will be heard together they will be able to.

O'REGAN J:

Why if they're not a party to it?

MR DILLON:

But if the proceedings are heard together –

ELIAS CJ:

But it'll be relevant. If this case goes ahead it'll be relevant anyway.

MR DILLON:

Indeed.

ELIAS CJ:

I mean surely we shouldn't get too hung up on in what proceeding these may have some validity or have been filed. The issue really is whether the, whether these hearsay affidavits were appropriately taken into account in deciding whether summary judgment was appropriate.

MR DILLON:

And that is exactly the point, Your Honour. If this matter does proceed the witness will be giving evidence in effectively both proceeding because it is relevant to whether Mr Sandman had testamentary capacity in relation to the will just as much as capacity for –

ELIAS CJ:

Well, it probably won't be coming in in affidavit form. They'll probably be called.

MR DILLON:

Indeed.

ELIAS CJ:

Yes.

MR DILLON:

Yes, yes, and I address the hearsay issues by going through the – starting with the Evidence Act 2006 and going through the High Court Rules 2016. You'll see attached to the oral submissions –

GLAZEBROOK J:

Well, perhaps because in the Court of Appeal and/or the High Court they said, one, they're not admissible but secondly they said and even if they were there was nothing in them that pointed to dishonesty so maybe if we cut to the chase and you tell us what's in them that you say is relevant.

ELIAS CJ:

There's evidence of – which goes to knowledge. That's your point, isn't it?

MR DILLON:

Indeed.

GLAZEBROOK J:

Is that the only point?

ELIAS CJ:

And you're really putting everything on knowledge and whether that's right is something that we'll probably need to explore. But your point is if lawyers participate in the knowledge that the person for whom they're acting has, doesn't have testamentary capacity and is acting under influence that is dishonest.

MR DILLON:

That is the heart of it or it –

GLAZEBROOK J:

So that is all, just so I'm clear, is that all that's in the affidavits? Knowledge?

MR DILLON:

In the affidavits are comments by third parties who knew Mrs Sandman, who knew her at the time that she executed the wills.

ELIAS CJ:

Perhaps you should take us to them if – I've read them but perhaps you should take us to them. Do you want to see them?

ARNOLD J:

I understood that these affidavits didn't say anything about the firm's knowledge but they were the views of, as you said, people who knew Mrs Sandman who thought that she had cognitive difficulties, is that correct?

MR DILLON:

That is true and also that they knew that there were third parties acting on her behalf before and up to the point where she executed the will. In other words third parties looking at Mrs Sandman are aware first of all that she doesn't really understand what's going on but also that other parties are looking after her affairs for her and given that knowledge we then look at what the firm says in its affidavit and the firm confirms that the firm was aware of these third

parties acting to assist Mrs Sandman in her affairs. Now of course the firm minimises the nature and extent of that. These other third parties say well –

ELIAS CJ:

This material is really put out to counter the assertion, which is not tested because it's just, it comes up in summary judgment application, by Ms Paul that she believed the testatrix had testamentary capacity.

MR DILLON:

Indeed, it is a counter to that, but Mrs Paul's own evidence indicates that while she believed it she thought it was prudent to get a medical certificate and that this was a necessary precondition to taking her further steps and then we look at who she reports to. She doesn't report to Mrs Sandman. She reports to these attorneys that the other party say are acting for Mrs Sandman.

ARNOLD J:

Your argument then involves a challenge to the certificate given by the doctor?

MR DILLON:

Not necessarily. It's just that the certificate is three months out of date. The question is did she have –

ARNOLD J:

No, no, but the various activities that you allege occurred when Mrs Sandman was incompetent, a lot of them or some of them pre-date the visit the doctor had at the end of September.

MR DILLON:

Indeed they do, yes.

ARNOLD J:

That's right so you're saying that the doctor's certificate based on her eight years of treatment of Mrs Sandman and the visit with Mrs Sandman on the 30th of September the certificate was improperly given?

MR DILLON:

Well, it would be –

ELIAS CJ:

It's a matter for trial, you'd say.

MR DILLON:

It is a matter for trial the questioning of the document.

ARNOLD J:

Well, no, it's a matter of allegation, isn't it? If you're saying that that certificate was given improperly.

MR DILLON:

The claim isn't against the doctor but the doctor's certificate would be a matter at issue particularly.

ELIAS CJ:

It's an opinion and the point is that you have put up some evidence. Now whether it's sufficient would be a matter for trial but it goes to whether that opinion can be accepted.

MR DILLON:

That is certainly one of the factors. Given that Mr Sandman has put up the entire medical records of a period for the full year leading up to the execution of the will where there are a series of statements in the medical records which would indicate that the doctor's certificate has got a very large question mark over it even though it's three months before –

GLAZEBROOK J:

Can I just check again what exactly the third party affidavits show? Do they say anything whatsoever about the knowledge of the firm? Because in fact you won, if that's the right word, in summary judgment as of course you had to because it hadn't been tested on whether or not Mrs Sandman had testamentary capacity and if all the affidavits do is to show that she didn't, well, that's accepted as a matter for trial and was accepted as such by the Court of Appeal.

MR DILLON:

Yes, and the –

GLAZEBROOK J:

So do the affidavits…

ELIAS CJ:

No, they are all relating to how she appeared and the opinions that others had that she lacked testamentary capacity.

MR DILLON:

Indeed, if, if –

GLAZEBROOK J:

So they don't go to dishonesty is the question I was asking.

MR DILLON:

I don't believe that any of them refer directly to the firm itself.

GLAZEBROOK J:

Right.

MR DILLON:

It is all about Mrs Sandman's capacity and how apparent that was to these third parties who knew her and were, had some interactions with her at the relevant time and that's to be compared to Ms Paul's statement of her belief of

Mrs Sandman's capacity. So it's not a direct challenge where those third parties are saying the firm knew this because. They're not saying that.

GLAZEBROOK J:
No, that's – thank you, that's… So I understand.

MR DILLON:
The medical evidence presumably is part of the evidence that was excluded as hearsay. If –

ELIAS CJ:
Well, there's no discussion of it in the Court of Appeal decision.

MR DILLON:
No.

ELIAS CJ:
So one imagines that.

MR DILLON:
Yes, and that evidence came in through Mr Sandman's own affidavit saying, "Here is the medical record that I've obtained," and then is drawing particular attention to various of those documents. In that regard it's submitted that it's inappropriate to rule the medical evidence out as hearsay on the grounds that they're clearly business records within section 16 of the Evidence Act which you'll find replicated –

GLAZEBROOK J:
Well, I'm not sure they necessarily did rule those out. Wasn't it just the affidavits of the third parties?

MR DILLON:
It, it –

GLAZEBROOK J:

But to the extent in any event that they didn't need to rule on testamentary capacity why is it relevant and weren't, and weren't even purporting to?

MR DILLON:

It's not clear from the judgment that the medical records were specifically regarded as hearsay. They're not mentioned in the judgment. What is mentioned is that the affidavits are hearsay so that is the proposition that's being attacked in relation to the medical records. It's respectfully submitted that the medical records and the way they were submitted as an annexure to Mr Sandman's affidavit would not normally be regarded as hearsay in the context particularly of a summary judgment application.

ELIAS CJ:

Well, there's also no discussion about the use to which it's being put which one would have thought was relevant to an assessment under section 18 in any event and it may be for Mr Hunt to comment on rather than you but I'm a little surprised that there wasn't some consideration of that because one can see that you might exclude it at a substantive hearing if that's all that is put up and you don't get an opportunity to test it but it may be something that – it may be material that is appropriately admitted for the purposes of deciding whether the case can be summarily disposed of. It's a different sort of inquiry.

MR DILLON:

And that is indeed exactly what the appellant is suggesting in relation to the medical evidence. The rules around the presentation of that type of record allow for some degree of reasonableness in relation to how reliable the record would be if it's in the normal course and the costs of producing it in a more formal sense, for instance, the registrar or some appropriate person from the hospital board filing an affidavit saying here are Mrs Sandman's records. It seems to be really an unwarranted step in the context of a summary judgment where Mr Sandman's obligation effectively is to show that there is a substantive basis by which the defences will not succeed in a summary judgment context.

ELLEN FRANCE J:

So are we talking about his affidavits in the, two affidavits in the Family Court proceedings?

MR DILLON:

Yes, I'm talking about the affidavit that is in the Family Court proceeding that annexes the medical record but is referred to in his substantive affidavit filed in this proceeding. In this proceeding he files an affidavit which annexes his entire –

ELLEN FRANCE J:

No, no, no, I understand that. It's just that I thought the Court of Appeal did take into account, say they expressly take into account, paragraph 35, the two affidavits of Mr Sandman in the Family Court proceedings but not the ones relating – not the ones coming from what we're calling the third parties.

MR DILLON:

Yes, that is correct, in fact, yes, yes. So that would indicate that the medical records were accepted.

ELLEN FRANCE J:

Well, that's as I understood it.

GLAZEBROOK J:

But they didn't need to be referred to because the capacity question was something that was for trial and was not being decided by the Court of Appeal.

MR DILLON:

Yes, although if the capacity issue was one for trial it seems difficult to logically then enter summary judgment for the respondent because one of the key issues is the capacity issued followed by the firm's knowledge of that capacity and in relation to the firm's knowledge the only evidence that is effective addressing that issue is the firm's own affidavit by Ms Paul and

analysing her affidavit in the context of evidence of medical incapacity raises the sorts of questions that are set out under (iii) of the oral submission.

GLAZEBROOK J:
Well, that's dependent on your submission that knowing assistance includes knowingly making a will for somebody on behalf of somebody who was incompetent. It's all dependent on that proposition, is that right?

MR DILLON:
Yes, the proposition perhaps has got an extra stage in it. It's making a will on the instructions of a third party regarding the affairs of somebody who's incompetent because it is that middle step that creates the trust as between the –

GLAZEBROOK J:
Can you just explain to me how it creates a trust?

MR DILLON:
In this particular case we have people operating as Mrs Sandman's attorney and that's the significance of the third party affidavits that were excluded but also Mr Sandman says the same thing in his affidavits, that throughout this time –

GLAZEBROOK J:
But how does it create a trust and is it a trust in favour of Mr Sandman or someone else?

MR DILLON:
The trust really is – it could best be described as a fiduciary relationship that arises between Mrs Sandman and her attorneys and in pursuing their own interests or what Mr Sandman alleges in particular were Vicky's own interests in ensuring –

GLAZEBROOK J:

And the own interests are actually excluding Mr Sandman, is that right?

MR DILLON:

That's right, yes. That's his case, how he sees these things having developed. There's no particular reason to expect Vicky to have any particular interest because she knew that she was dying, but her interests seemed to be to ensure that the entire estate didn't pass to Mark.

GLAZEBROOK J:

Okay, can I just, can we just go through the steps then? So a fiduciary relationship with the attorney. Why does the fiduciary relationship, the fact that she's got an enduring power of attorney which doesn't relate to a will, why is that significant?

MR DILLON:

There was an existing will which was perfectly acceptable to Mrs Sandman when she executed it in 2005. The only intervening events were Mrs Sandman's incapacity, Vicky's knowledge of her impending death and Vicky's ability to influence Mrs Sandman in the disposition of her property. Because there was an existing will there was an inchoate interest of Mr Sandman in that existing will and the firm was specifically aware of that interest in the existing will. Steps taken by –

O'REGAN J:

Sorry, could you just say that again? Mr Sandman had an inchoate, did you say?

MR DILLON:

Yes. It's something that would never vest until the testatrix died and of course she has the ability to change it at any stage provided she has capacity or there's an order of the Court under the relevant legislation effectively creating a will for her but no steps were taken along those lines. So the only person that can change that –

O'REGAN J:

So are you saying Vicky owed a duty to Mr Sandman because of that?

MR DILLON:

Vicky's duties effectively were owed to Mrs Sandman and she breached them when she interfered with Mrs Sandman's testamentary disposition in the 2005 will for organising the new will which is what Mr Sandman is attacking. Now that proposition –

ELIAS CJ:

But effectively though you have to say that the will was invalid. So I'm just really not sure about all these intermediate steps which seem to be unnecessary complication but – because you are asserting a direct claim. You're saying that he was someone or are you just saying that he has standing because of that interest?

MR DILLON:

It's submitted it goes beyond standing and it's, the standing issue is something that was discussed but the standing really is just a reflection of the fact that he does have an interest that he's entitled to pursue.

ELIAS CJ:

Well, he's claiming damages.

MR DILLON:

Yes.

ELIAS CJ:

So he's certainly asserting an interest, a direct interest.

MR DILLON:

Yes. But he has – the interest that he's asserting and the standing that arises arises under the 2005 will in relation to this issue of the accessory liability question of the firm when that interest is interfered with. So it is absolutely no

different from a trust and a beneficiary under a trust seeking to have the trust enforced except that the trust –

ELIAS CJ:

All the accessory liability cases that I've ever seen are ones where the – where property has been taken from the trust. This is different really. This is the trust itself that's being attacked, ie, the will.

MR DILLON:

Let's take that in stages. The trust. If we take the trust as the 2005 will then –

ELIAS CJ:

I just don't see that you can do that.

O'REGAN J:

No, because a will can be changed at any time. You don't have any vested interest or any – I mean most beneficiaries of wills don't even know they're in the will.

ELIAS CJ:

Not even if –(inaudible)– interest.

MR DILLON:

That's entirely accepted, Sir, but that doesn't, that doesn't change the analogy by a trust. The beneficiaries of trust might not be aware that they are beneficiaries of a trust but that doesn't change their interest in the trust.

GLAZEBROOK J:

But there isn't a trust and no interest in it.

O'REGAN J:

No, there isn't a trust and there isn't a – yes.

MR DILLON:

Well, let's start with the proposition that there's a 2005 will fully effective. Mr Sandman is a beneficiary under that will and because of Mrs Sandman's dementia she cannot make another will. If we accept those proposition then anybody interfering with Mr Sandman's interest under that will is breaching the trust and in this particular instance Vicky and Mr Giboney had a particular –

GLAZEBROOK J:

But there certainly wasn't any trust before she died.

ELIAS CJ:

There's no trust anyway, so there's a – there are fiduciary duties owed by the people who are the repositories of the EPO. There's a fiduciary duty owed by the lawyers acting for Mrs Sandman to her. Now where do we go?

MR DILLON:

Well, let's take the fiduciary duties owed by Vicky to Mrs Sandman. What do they extend to in –

ELIAS CJ:

Not taking advantage of her.

MR DILLON:

Not taking advantage of her.

O'REGAN J:

But you're saying that that arises under the power of attorney which didn't relate to the will.

MR DILLON:

Well, the evidence suggests that there was a power of attorney that was being exercised even before the ones that are attacked which were signed the same day as the wills so there were prior powers of attorney.

ELIAS CJ:

But that was because she had to have an enduring power of attorney to get into the retirement village.

O'REGAN J:

Yes.

ELIAS CJ:

So it doesn't, it's not even necessarily evidential. I mean I must say I would have thought that the EPO is of some evidential interest but here, because of that background, I'm not even sure how much reliance can be placed on it as evidence of incapacity.

MR DILLON:

There is the existing, the pre-existing actions of Vicky and Mr Giboney even before the EPOs that are attacked in the other proceedings.

GLAZEBROOK J:

But what – where's the, where does the trust – none of those enduring power of attorney allow them to make a will on her behalf and didn't purport to.

MR DILLON:

Yes, exactly, yes.

GLAZEBROOK J:

So how do they relate to the will?

MR DILLON:

Because they have the power over Mrs Sandman's affairs, they have the power to, for instance, engage solicitors in relation to her affairs and in engaging solicitors the will that's attacked is created but there is no power on those parties to create a will for Mrs Sandman. That's completely outside.

GLAZEBROOK J:

So where does the trust or the fiduciary duty in relation to that will arise because they're not taking any of her money –

MR DILLON:

No, no, it –

GLAZEBROOK J:

– because her money won't be her money when she is deceased.

MR DILLON:

The fiduciary duties we're looking at here are the fiduciary duties that the attorneys or agents of Mrs Sandman owe to Mrs Sandman.

GLAZEBROOK J:

Well, but that's in relation to her money and her affairs. Once she's dead it's no longer her money or her affairs.

MR DILLON:

No, no, we're just dealing with Mrs Sandman alive, Mrs Sandman's living requirements and the fact that Vicky and Mr Giboney are acting as her attorney/agent in relation to those affairs at a particular point of time. Because they are acting as her attorney and/or agents they have a fiduciary duty to her.

ELIAS CJ:

But they have a fiduciary duty anyway which is why I cannot understand why there are so many steps being brought into this because if in fact the solicitors procured a will which was invalid because she lacked testamentary capacity or because she was being unduly influenced, that overwhelms all these intermediate steps about they rang up the solicitor using the EPO and said, "Come and make a will." Those are all preliminary things. The real gravamen of the whole case is that she made a will you say lacking testamentary capacity or under the influence of Vicky.

MR DILLON:

And that's…

ELIAS CJ:

And that was to the knowledge of the solicitors. That's your case.

MR DILLON:

That's perfectly adequate up to the point where the knowledge of the solicitors become involved because the knowledge of the solicitors has to relate to a breach of a duty and that duty is this fiduciary duty between Mr Giboney Vicky on the one hand and Mrs Sandman in the other.

ELIAS CJ:

Well, I think it's overwhelmed by the fact that it would be a gross breach of fiduciary duty for lawyers to procure a will from a client who lacked testamentary capacity. That's –

GLAZEBROOK J:

Can we say that I totally disagree with that proposition.

ELIAS CJ:

Do you? Sure.

GLAZEBROOK J:

But just so that that's clear.

ELIAS CJ:

Well, then we need to go through all the steps.

GLAZEBROOK J:

No, no, no, but only in the sense that it would seem to me that a lawyer has a duty to their client and whether their client has testamentary capacity or not is something that will be looked at later if that is a question but I don't think a lawyer could refuse to be – to – for their client refuse to make a will in those circumstances whatever their suspicions might be about that.

MR DILLON:

If, if the lawyers are aware that the client lacks testamentary capacity then there would be an issue as to whether they're breaching their duty to the client in presenting a document for signing by that client but that is a duty as between Mrs Sandman and the firm and that, it's respectfully submitted, is irrelevant to the knowing assistance. It exists. It's certainly there but it is not relevant to the accessory principle which is being accessory to a breach by the trustees as they're usually referred to.

GLAZEBROOK J:

Well, I suppose my problem is even if you accept there's a duty not to make a will it puts the – if you then say that there's a duty to the beneficiaries presumably both of the will that wasn't made because you didn't let the person sign it and also to the – so you're in a rock and a hard place really. Do you let them sign it in which case you owe a duty to the previous will? Do you not let them sign it in which case if she did have the testamentary capacity you have the beneficiaries of the will that wasn't made so argue?

MR DILLON:

And where that –

GLAZEBROOK J:

So you are accepting that that is only a duty if it does exist to Mrs Sandman.

MR DILLON:

The fiduciary duty between the solicitor and the client in this case in relation to that will would be between Mrs Sandman and the firm.

GLAZEBROOK J:

So it's there's no duty that you're asserting from that to either a beneficiary of the old will or a beneficiary of the new will?

MR DILLON:

If the firm is aware that there is an issue of capacity and they don't know whether or not capacity exists then that would lead us into the *Nijsse v Squires* CA53/04, 15 December 2004 type situation where the Court has set out some practical steps that the solicitors should be following to ensure that there is some verification that at the time at the date that the will is sign the testatrix in this case knew what she was doing with a gloss that those same steps might be applied at an earlier stage when the instructions are being given so that one of those two times it can be established that the testatrix had testamentary capacity. In this case there is knowledge that there's an issue sufficient to require a medical certificate but no steps taken at the time of execution or during the course –

GLAZEBROOK J:

But where does the duty to Mr Sandman arise out of all of that?

MR DILLON:

Well, it doesn't arise out of that because that is addressing the duties if –

GLAZEBROOK J:

All right, so you accept there's no duty arising out of that.

MR DILLON:

Not as between the firm's duties to Mrs Sandman in relation to the preparation of the will. It arises in terms of the knowing assistance because of the way that the attorney/agents had procured the document so that it could be placed in front of Mrs Sandman for execution by her and that's where the fact that this is an accessory liability or an assistance cause of action arises. It's not the direct claim. It's the accessory claim.

ELLEN FRANCE J:

And sorry, does that then go back to the earlier will? Is that what that's based on?

MR DILLON:

Yes, because that earlier will should not have been touched because Mrs Sandman didn't have capacity.

GLAZEBROOK J:

Well, that would be the effect of the first cause of action if in fact she didn't have testamentary capacity then the earlier will will happen.

MR DILLON:

Yes.

GLAZEBROOK J:

Whether there was a breach of duty on the part of the solicitors or not in fact it would, that would happen.

MR DILLON:

Indeed, it will roll back to the 2005 will but at that point this issue of how that will was interfered with becomes live and that's where the accessory liability issue arises and that's why it is an accessory.

O'REGAN J:

But if that will's invalid, don't we go back to the 2005 will anyway?

MR DILLON:

But that's what I'm saying, Sir. Yes, Sir, if we –

O'REGAN J:

So why are you involving the lawyers in this?

MR DILLON:

The – it's a question of establishing who has liability in relation to these circumstances. The agents and attorneys didn't draft the will. They didn't prepare it. They didn't receive the instructions.

O'REGAN J:

But you won't suffer any loss if you get the money that were entitled to under the 2005 will.

MR DILLON:

But there will be questions as to the extent to which it's been already distributed and other third party claims.

O'REGAN J:

But didn't your client agree to that? Didn't he agree to it?

MR DILLON:

He agreed to the distribution to himself and I think he signed off to allow an early distribution. So those issues would be relevant to the executors' positions. It's only because further investigation was made around the circumstances of the execution of the will that the claim was brought and the accessory liability issue arose. I think it arose frankly out of pursuing the Family Court proceeding when the circumstances became clearer.

O'REGAN J:

Yes, if this is a clearer version of the circumstances must have been pretty murky then.

MR DILLON:

Well, in that regard there are issues here that really should be resolved at hearing and particularly this issue of knowledge. We have Ms Paul's statement but as the submissions from the appellant set out there are large gaps in relation to how the instructions were completed and quite significant inconsistencies in terms of the reporting by the firm back to Mrs Sandman because it was variously to the agents directly with instructions from the agents directly and sometimes to all of the agents and Mrs Sandman notwithstanding there was an instruction not to send it to Mrs Sandman allegedly because Mr Mark Sandman might become privy to the information which raises another inconsistency if Mrs Sandman couldn't keep her

confidential affairs confidential does that raise a question about her capacity at the time when that sort of instruction was being given.

GLAZEBROOK J:
I thought it was really that he would see the letter if he went to visit.

O'REGAN J:
Yes.

GLAZEBROOK J:
But I think that's how it was put but…

MR DILLON:
Yes.

GLAZEBROOK J:
Which isn't anything to do with her keeping affairs secret. It's keeping documents secret but that's as I've understood it.

MR DILLON:
That indeed is what Ms Paul was saying her instructions were and yet subsequently she sends this letter off to the agents and Mrs Sandman effectively contrary to that type of instruction. If one goes through the documentary chain there's also some – the last reporting letter prior to the execution of the documents refers to the fact that the instructions are not complete, that there are still some further details to be filled in and then there's a gap and there's no indication of how those gaps were filled, how those instructions came to be made. The next step is actually signing the will. This raises very serious concerns regarding the question of whose instructions they were. There's a statement in one of the letters about reviewing the powers of attorney and that instruction is recorded in the letter as coming from Vicky and that instruction is then acted upon. Clearly it wasn't Mrs Sandman's instructions. It was her agents' instructions. And that is a factor which relates back again to the fact that the agents in Mr Sandman's

submission are the ones that have the conduct of getting this new will in place and that's accepted by the firm and acted on by the firm and that gives rise to their accessory liability.

In relation to the –

GLAZEBROOK J:
I think you hadn't quite finished saying why the trust arose. Is there anything more – or you might have done but was there anything more you wanted to say on that?

MR DILLON:
The written submissions set out in paragraphs 17 and following the relevant cases that touch on this issue.

GLAZEBROOK J:
Can you just sort of in a nutshell say why the trust arose?

MR DILLON:
The relevant trust is the one that arises under the 2005 will. It's relevant because it sits there as the last, in Mr Sandman's submission, the last proper will executed by Mrs Sandman. The firm –

GLAZEBROOK J:
And so how was making a new will in breach of that trust then?

MR DILLON:
The firm knew of that will and what it provided in favour of Mr Sandman. So they had knowledge of his interests in it. The firm in Mr Sandman's submission then takes these various steps that create this new document. That is the one that's being attacked. Now –

O'REGAN J:

Have you got authority for the proposition that a will creates a trust in favour of a putative beneficiary prior to the death of the testator?

MR DILLON:

At about paragraph 22 of the written submissions, the ones that were originally filed, there's a reference to the *Burgess v Monk* [2016] NZHC 527, [2016] NZAR 438 case which appears in the bundle of authorities at page 5. That case was dealing with the right of access to information by way of discovery effectively and the Court refers to the beneficiaries being in this case I think just residuary beneficiaries and they were attacking the legal advice that the trustees had obtained in relation to the trust's affairs.

O'REGAN J:

Is that a case related to a will of a testator who's still alive?

MR DILLON:

No, no, but it does show how by analogy.

O'REGAN J:

Well, I think we all agree that after the testator's died there will be a trust arising.

MR DILLON:

Yes.

O'REGAN J:

But what I'm asking you is why is there one prior to her death?

MR DILLON:

Well, it's submitted that the analogy is with a trust where there are residual beneficiaries, the trust is being administered and whether the residual beneficiaries have an interest in the administration of the trust.

O'REGAN J:

Yes, but we haven't got to the point that there is a trust yet. I'm asking you why is there a trust prior to death.

MR DILLON:

In the *Sadler v Public Trust* [2009] NZCA 364, [2009] NZFLR 937 case which is at paragraph 23 we have the –

GLAZEBROOK J:

23. Have we got it?

MR DILLON:

Sorry, 23 of the written submission.

GLAZEBROOK J:

And have we got that case?

MR DILLON:

Yes. It is – I'll just find that.

ELLEN FRANCE J:

Page 321, down the bottom.

MR DILLON:

And that's a case where you've got potential claimants against an estate. So…

O'REGAN J:

Yes, but it's the executive of the estate though, isn't it? So it's not a –

MR DILLON:

It's a claim against the – that was a claim against the executives and whether they had duties –

O'REGAN J:

Well, how does that help you though in relation to a will that hasn't actually been activated by the death of the testator yet?

MR DILLON:

Well, in that particular case they were dealing with potential claimants against the estate. So –

ELIAS CJ:

But they are trustee. I mean they're executors.

O'REGAN J:

Executors that – yes. It's a completely different situation. Well, what I'm trying to get to is you seem to be saying the 2005 will was operative as a trust in favour of Mr Sandman prior to the death of Mrs Sandman.

MR DILLON:

Yes.

O'REGAN J:

And what I asked you for was authority for that proposition. You've taken me to two cases which have got nothing to do with that.

MR DILLON:

Well with respect they're setting out how with the existence of a fiduciary duty there are rights that claimants against effectively the execution of those fiduciary duties can be made.

O'REGAN J:

Yes, but nobody is talking about any – I mean there's a fundamental difference. Once the testator has died the executor has a trust relationship with beneficiaries and in *Sadler's* case obviously there was a question of who they were but prior to the death of the testator the executor doesn't – and the – what you're saying is the testator has a trust duty, are you, to Mr Sandman

prior to her death? Because if that's right how could she ever change her will even if she was of sane mind?

MR DILLON:

No, that can't be correct because she does have the ability if she is of sane mind but as soon as she loses that capacity herself to change it.

O'REGAN J:

She becomes a trustee?

MR DILLON:

To the extent that people attempt to interfere with that disposition which is what Mr Sandman alleges here. They are interfering in that relationship which is effectively waiting for Mrs Sandman's death.

O'REGAN J:

Well, again I just repeat my question. Have you got any authority for that proposition?

MR DILLON:

The closest probably is the *Simpson and Anor v Walker and Ors* [2012] NZCA 191 case which…

GLAZEBROOK J:

And whereabouts is that?

MR DILLON:

I'm just finding that, Your Honour.

ARNOLD J:

473.

MR DILLON:

Yes, 473. Now the facts of that case were that the deceased was incapacitated and made three deeds while he was incapacitated and the

solicitor, you'll see this at paragraph 26 of the case, that's page 434, paragraph 26, where the findings of fact are recorded, that the relevant ones are these deeds while incapacitated and also that the solicitor was acting in relation to those transactions and he was acting in fact for various parties to the transactions that related to those deeds.

O'REGAN J:
But this isn't a case about a will, is it?

ARNOLD J:
It's a Family Protection claim, isn't it?

MR DILLON:
Yes, it arises after the person who is incapacitated has died and they're unravelling the affairs of the estate and all of these steps that have been referred to at paragraph 26 are occurring while the person referred to as Alan is still alive but incapacitated, and the conduct complained of was allowing these documents to be executed while the person referred to as Alan is incapacitated and then having those transactions that are referred to then implemented in circumstances where he procures the signature of parties against their own interests but rather unwittingly to them, their signing various documents against their own interests which takes property out of their, effectively out of their inheritance, so to that extent on a factual basis it is quite similar to what Mr Sandman is referring to here. You'll see the relevant factual steps flow from about paragraph 53 of the judgment starting at page 492 and refers to Mr Bellamy who was the solicitor being in breach of duties owed to all the parties. So Mr Bellamy was acting for the parties.

GLAZEBROOK J:
But those were direct rather than knowing assistance.

MR DILLON:
They were.

GLAZEBROOK J:
It was effectively direct duty to the parties.

MR DILLON:
It was.

GLAZEBROOK J:
Which you're not alleging here.

MR DILLON:
It's not being alleged that the firm owed a duty direct to Mr Mark Sandman but that they assisted –

GLAZEBROOK J:
We understand.

MR DILLON:
– with knowledge of that, of his interest. You see Mr Bellamy's actions at 58 really a failure to explain to one set of his clients the consequences of executing documents that benefited another set of his clients.

At paragraph 60, the middle of the paragraph, given that Mr Bellamy acted for all of the parties throughout, secondly the shares were owned by Alan, Alan was under a disability, and Diane and Pamela were Alan's residual beneficiaries, the interests of Colin and Elaine on the dairy company share transactions were clearly in conflict with the interests of Alan and those of Diane and Pamela.

O'REGAN J:
But there the lawyer was acting for everyone.

MR DILLON:
For everyone, yes, indeed.

O'REGAN J:
So it's a completely different situation.

MR DILLON:
But it's respectfully submitted it does, although he was acting for everybody, the analysis is about how the interests of the residual beneficiaries were compromised by steps taken during the life of Alan against the interests of those residual beneficiaries, and to that extent that is what is being alleged by Mr Sandman against the firm here. It's submitted it is not a necessary element that the firm be acting for Mr Sandman if they take steps against his interests which they know of. What is important is that they know of those interests and they clearly did. It's quite clear from Ms Paul's affidavit.

And that is the closest factual analysis to the facts that we have in front of us in this particular case. But each of the cases that relied on, although they are different facts, have a similar analysis of the existence of fiduciary duties and the use of those fiduciary duties to the detriment of somebody like Mr Sandman.

O'REGAN J:
But you're not saying that Mrs Sandman had a fiduciary duty to Mr Sandman in relation to the 2005 will?

MR DILLON:
No, can't be, that can't be said because Mrs Sandman effectively is the settlor of the trust if we regard the 2005 will in that context but having settled it for reasons of her own incapacity she can't interfere with it anyway but third parties manage to. That's Mr Sandman's case. So it wasn't her that's – her actions aren't really at issue. It's the parties that stood in her place and procured that interference with that arrangement that is what is being attacked and the firm assisted that.

ARNOLD J:
So who owed the fiduciary duty to your client?

MR DILLON:

It's not a question of fiduciary duties to Mr Sandman. It's a question of fiduciaries using or misusing their duties to Mrs Sandman which deprived Mr Sandman of his known entitlements under the 2005 will which for the purposes of this analysis we regard that as a trust which then can't be interfered with. We have got intervenors interfering with it and the firm assisting in that intervention.

GLAZEBROOK J:

So you're not suggesting that either Vicky or Mr Giboney had fiduciary duties to Mr Sandman?

MR DILLON:

Not directly and it's not necessary for the purposes of Mr Sandman's claim that that be the case. To some extent it might be true but I haven't really analysed it on that basis. Mr and Mrs – Mr Giboney and Vicky owe their duties to conduct their mother's affairs in accordance with their mother's best interests and do not have the power to interfere with her will and yet they use their powers to achieve that object and the firm assists them in doing so. That is Mr Sandman's case.

The High Court and the Court of Appeal in relation to the legal analysis appear to have accepted that as an available claim that Mr Sandman could bring. The difficulty in the Court of Appeal was that the hearsay challenge in particular stripped or undercut some of the supporting material which undermined Ms Paul's statement of her belief and really the credibility of her belief in relation to the steps that she took once one looks at who she was reporting to and where she obtained her instructions from and the gaps that appear from her own narrative. One thing that is very apparent as one works through the chronology is that at every stage of receiving instructions from Mrs Sandman Vicky was present. At every stage. That's when it was done person to person. When it's done over the telephone it's not even Mrs Sandman on the other end and when it's in correspondence it's invariably copied. If it is directed only to Mrs Sandman it's copied to the third parties and

if Mrs Sandman is in full charge of her facilities why does she need attorneys for those purposes. If she has mental capacity to achieve these then it's a matter of a visit and the taking of instructions with an appropriate note of those instructions at the time, the preparation of the documents and the attending on the client. Making a new will for somebody that has capacity is a very straightforward process but this process seems to have been quite protracted with multiple reports but those reports seem to be to third parties almost invariably, and there's still gaps in the narrative as to how the will was completed. The last written statement to Mrs Sandman and the attorneys refers specifically to the fact that there are still gaps in the will that need to be completed and then the next step in the narrative is executing the will. There must have been something in between but there is no evidence as to what that was. It was Mr Sandman's case of course that Vicky was driving the entire process and those instructions would have come via Vicky and/or Mr Giboney and accordingly it's not Mrs Sandman's will and they have interfered in his rights under the 2005 will by procuring this document.

O'REGAN J:
Well, I thought we'd established that he didn't have any rights under the 2005 will.

MR DILLON:
Well, if this last will is set aside then Mrs Sandman has died there is the 2005 will.

O'REGAN J:
Yes, because Mrs Sandman has died but she hadn't died at that point, had she?

MR DILLON:
She hadn't died and she couldn't change her will because she didn't have capacity to. So that is why in the – earlier this morning I referred to it as inchoate rights.

O'REGAN J:

So Vicky didn't owe a duty to Mr Sandman. Mr Giboney didn't owe a duty to Mr Sandman. Mrs Sandman didn't owe a duty to Mr Sandman and neither did the lawyers. Is it?

MR DILLON:

I have not taken the question of whether Vicky and/or Mr Giboney owed any duties direct to Mr Sandman. I'm –

O'REGAN J:

Well, you just said that they didn't a minute ago.

MR DILLON:

I think it was a little bit less direct than that. The analysis hasn't been put on that basis, that it may exist but it hasn't been put on that basis. It's certainly not pleaded on that basis. Again they certainly had knowledge of Mr Sandman's rights under the 2005 will. If they were intentionally seeking to defeat that by having Mrs Sandman execute a will in circumstances where they knew she couldn't then it may be an available analysis to say that they did owe him duties.

O'REGAN J:

Well, it's not pleaded so it doesn't matter.

MR DILLON:

Indeed, but it is, it's possible. The point with the firm is that they did have, clearly have all that knowledge and assisted in the making of this series of documents that are all attacked. The statutory demand that sets out the reasons why Mrs Sandman executed the will is itself an anomalous document in the sense that the…

O'REGAN J:

Sorry, what document is it again?

ELIAS CJ:

It's not a statutory demand. You mean the statutory declaration?

MR DILLON:

Declaration, sorry, yes.

GLAZEBROOK J:

Where she did have independent advice.

MR DILLON:

Too much time in liquidation matters.

MR DILLON:

Yes, the statutory declaration is itself an anomalous document. Ms Paul in her affidavit says that she's thought it would be a good idea to draft this up so she drafts it up and has Mrs Sandman executed it. It's –

ELIAS CJ:

Well, she said it would be better for it not to be in the will which would become a public document but it serves the same effect as that sort of statement in a will put in to ward off challenge.

MR DILLON:

Indeed. But again when one reads her affidavit as to how this document came to exist, there are some questions around that which would and will be tested if the matter comes to hearing why that was created in the particular circumstances given this history in relation to Mrs Sandman's incapacity. There's also a reference in Ms Paul's affidavit to Mrs Sandman being upset about making this new will. That, the fact that she's upset is recorded and we can take that as a fact. The reason that she was upset Ms Paul describes as the concern that perhaps Mrs Sandman is aware that she's creating some interfamily tension which she wishes to avoid.

ARNOLD J:

Hadn't she just been told that her daughter had cancer, terminal cancer?

MR DILLON:

Indeed but she doesn't, for instance, suggest that there's no point in having Vicky in the will. Indeed she does something rather peculiar. She is creating the enduring powers of attorney in circumstances where it does appear that Mr Giboney is already acting on behalf of Vicky but Mrs Sandman gives Vicky a power of attorney when Mrs Sandman allegedly knows that Vicky has terminal cancer and has only got weeks to live. That is a very unusual type of disposition of your powers of attorney in those particular circumstances.

GLAZEBROOK J:

Wasn't it just a replacement of a power of attorney that didn't have a successor attorney with one that did which would be perfectly reasonable to do in the case of somebody who was dying?

MR DILLON:

That may well be the case but why not take the obligations off of Vicky entirely at that point if Vicky's –

GLAZEBROOK J:

Well, maybe they – well, we don't know but maybe Vicky wanted to continue acting for her mother as long as she could.

MR DILLON:

That could well have been Vicky's wishes except that Vicky's wishes in these circumstances are entirely irrelevant. It's her mother's wishes that are key.

GLAZEBROOK J:

Well, her mother may well have wanted Vicky to keep acting as long as she could as well.

ELIAS CJ:

Anyway this is all very speculative.

MR DILLON:

Indeed.

ELIAS CJ:

Mr Dillon, have you really said to us everything that you want to say because we'll take the adjournment shortly?

MR DILLON:

I believe I've surveyed everything and because I had prepared the oral submissions and have handed them up you have them in writing. They do attack the same issues from a different perspective and they cross-reference to the written submissions. Of particular importance probably is the last several pages and the analysis of both the Evidence Act and the High Court Rules which give effectively about 11 reasons why the evidence of Mr Sandman including those third party affidavits should not have been set aside as hearsay evidence although they do touch on things like the business record type issues. That's really out of respect for my friend's submissions who has taken the Evidence Act and referred to other sections of it but the whole thing hangs together as a whole, particularly in relation to summary judgment applications where the obligation on Mr Sandman is to point to credible disputes of fact around the evidence that the appellant, who were the appellants, the firm has to rely on. The firm really has to have Ms Paul's affidavit taken entirely and unchallenged in order to obtain the summary judgment outcome and given that the evidence of these third parties as independent people who are looking at Mrs Sandman's state of mental capacity in most cases saying, "Well, it was quite apparent to us that she wasn't able to conduct her own affairs." There was one who actually turned up on the day she signed the will and he deposes to the conversation he had with Mrs Sandman and she clearly was cognizant of the fact that she'd seen some lawyers that day and had no idea what she – what had happened and what she had signed. But there's also evidence completely subsidiary of the

people who were conducting Mrs Sandman's tax affairs receiving advice from Vicky quite early that year saying, "You don't have to do that any more. I'm looking after it." In other words, the whole agency attorney dynamic was apparent quite early on in the relevant year, 2010. Vicky was already taking over her mother's affairs at that stage even to the point of tax returns. All of that is relevant to the issue then of the state of Mrs Sandman and then the knowledge of the firm. The knowledge of the firm really does rely on Ms Paul's affidavit but there are holes in the narrative which are identified in the written submissions.

I think that takes it about as far as I can, thank you.

ELIAS CJ:
All right. Thank you, Mr Dillon. We'll take the morning adjournment now.

COURT ADJOURNS: 11.31 PM

COURT RESUMES: 11.47 AM

ELIAS CJ:
Yes, Mr Hunt.

MR HUNT:
Thank you. So I thought I'd just start with a brief synopsis of the five main points. Firstly on the matter of the evidence my submission is it doesn't really matter to the summary judgment strike out application whether that evidence is in or out. Our position, that was our position at the High Court and Court of Appeal but we did object simply on the basis that it was prima facie hearsay. We said that there if to be admitted under section 18 there were certain factual, a factual foundation that needed to be established and that hadn't happened so the evidence should be excluded but even if it goes in it doesn't undermine the application for strike out or summary judgment for the reasons that the Court has clearly picked up on that it doesn't go to the dishonesty of the firm. On the issue of –

ELIAS CJ:

Well, except the problem on that basis they might be absolutely right but the judgment we've had didn't consider it, the Court of Appeal judgment, so we'd be considering it.

MR HUNT:

Yes, and I will take you to those affidavits and you can have a look at them and decide whether they effect or create a factual foundation from which you could draw an inference of dishonesty from and my submission would be you can't.

ELIAS CJ:

All right, but just in terms of proper process I would have thought that invocation of the exclusionary power was a little odd in circumstances of a preliminary hearing of this nature where undoubtedly there would be considerable expense in calling the witnesses. So I'm a little surprised that the point was taken and acceded to in this context, particularly if you say it wouldn't have made any difference.

MR HUNT:

Well, the concern must be that procedurally putting into one proceeding affidavits from another proceeding can't be acceptable.

ELIAS CJ:

Well, except you're not and it's, in summary judgment it's only going to is this a spurious proposition of fact or is it one that'll have to go to hearing. So it's not a determination and it would be a very bad thing surely if in summary judgment matters people are going to be too precise about this sort of admissibility because all they're doing is – it's the burden's on the person applying for defendant summary judgment and all that is happening is the plaintiff is putting up this is not colourable. There is something here to be looked at.

MR HUNT:

Well, our concern really wasn't a process that this has been done in an incorrect manner. I –

ELIAS CJ:

Well, that's my concern too that we're going to be setting up procedures that are really going to be extremely expensive.

MR HUNT:

Well, not really. I mean it could've just been these affidavits were filed in this proceeding. Just get affidavits sworn in the usual way and file them in support.

ELIAS CJ:

But hang on, Ms Paul – the doctor's certificate was hearsay on a very technical view of things.

MR HUNT:

But we didn't take any objection to any of the material that was exhibited to Mr Sandman's affidavit. So that was a lot of medical evidence as well. We accepted that for the purposes of setting up the summary judgment and strike out that should all be looked at. But when he filed in his affidavit Mr Sandman's reference to a whole lot of exhibits which were other people's affidavits that's when we said, well, you should really lay a factual foundation. Under section 18 is there, is it inherently reliable? Are these people available? Those kinds of things. And I accept, Your Honour, that –

ELIAS CJ:

Yes. I mean it was directed at a threshold issue in a summary proceeding and I think we have to be careful about the invocation of rules of exclusion like that, particularly as generally it's admissible under the Evidence Act.

MR HUNT:

Well, in that case then I think I'll just take you to them a little bit later and we'll have a look at them and in my submission you could probably come to a

conclusion that they don't lead to a factual foundation which would allow an inference of dishonesty.

GLAZEBROOK J:
That was actually the conclusion the Court of Appeal indicated in any event, didn't it, I thought, or was that the High Court?

MR HUNT:
High Court didn't refer to it at all.

GLAZEBROOK J:
So the Court of Appeal I thought had said that they wouldn't have been of assistance anyway but maybe I'm – or maybe it was just recording a submission of yours. It might have been just recording a submission.

MR HUNT:
Turning to the dishonest assistance cause of action, the first submission the respondents make is a point that's already been raised by the Court is that Mr Sandman already has a remedy. He can challenge the 2010 will as he is doing on the grounds of undue influence and on the grounds of incapacity and if his problem is that there has already been a distribution then he's the one who signed off on early distribution having received legal advice so he really has no complaint against the firm in that regard.

So we say this isn't a case where the justice cries out for equity to intervene to create a remedy where there isn't one and the problem with, the first problem we see with Mr Sandman's case is this is an accessory liability case but he's relying on a breach of fiduciary duty by Vicky in favour of Mrs Sandman and that's not something which he is entitled to the benefit of.

All of the other cases on accessory liability are generally brought by either the trust or by people who have an interest, direct interest in the trust such as direct beneficiaries and they are claiming that the principle offender or transgressor is no longer available so I will have my remedy against the

person who dishonestly assisted but the remedy is for that breach of trust or breach of fiduciary duty. Now here that duty wasn't owed to Mr Sandman. It was owed to Mrs Sandman. So he doesn't have standing to bring a dishonest assistance case.

The second issue we say is that a dishonest assistance case requires the existence of trust property and sometimes the Court will recognise that through a remedial constructive trust. They'll find that because of the circumstances of the case the errant person is holding property on a constructive trust for another person who they have wronged. But here we don't have trust property. We've got a will which will come into existence on death so we don't actually have the existence of property which creates the necessary ingredient for the dishonest assistance cause of action, and we say it would be a significant extension of this cause of action to extend it out to a situation where you have simply a will which provides for how property might be dealt with in the future and this isn't the right case because really what we're looking at here is Mr Sandman who's had a lot of financial assistance throughout his life from his mother. She's paid for his living. She's paid for his health. She's given him under the will a house and half her estate. He's then had a substantial bequest in Vicky's estate. And now he's seeking the other half of the estate based on what in our submission is a baseless allegation of dishonesty against the law firm and we say this isn't the right case for marking the extension of a cause of action in the way that the appellants are seeking.

The final issue that we mark with the dishonest assistance cause of action is, again the Court's picked up on this, that he's saying it's a breach by Vicky of her power of attorney. That isn't what created the will. In order for an attorney to sign off on a will, I think it's section 103 of the Protection of Personal and Property Rights Act 1988, requires leave of the Court. So clearly there's a causative gap between what they are saying is the breach, the conduct under a power of attorney, and the signing of the will.

Looking at the question of dishonesty, firstly we have challenged the Court of Appeal's decision on additional grounds and one was that strike out could have been, should have been given in relation to the dishonesty because it simply hasn't been pleaded and – but there's no mention of the word "dishonesty". There's no particulars.

ELIAS CJ:

Isn't it a necessary inference though and isn't it an amendment that would clearly be permitted because if a solicitor knows that someone their acting for is acting under undue influence or arguably is incapacitated surely that's clearly dishonest behaviour on the part of the solicitor within the meaning?

MR HUNT:

Well, I would take issue with part of that and I will take you to a case called *Public Trust v Till* [1939] NZLR 613 where Justice Randerson looked at that very question and because he asked, well, what say the lawyer identifies a capacity issue, raises that with the client and the client says, "No, I want to sign the will anyway," and he said that the lawyer should go ahead and have the will prepared.

ELIAS CJ:

Well, that's Justice Glazebrook's point.

MR HUNT:

It is, yes.

ELIAS CJ:

All right, well, let's leave it with undue influence for the moment.

MR HUNT:

Sorry, undue influence in the sense of?

ELIAS CJ:

Well, that somebody is acting. Their will is being overborne by another person.

MR HUNT:

Well, we'd say that the plaintiff and the appellant has had every opportunity to put up proper particulars in pleading –

ELIAS CJ:

But what particular would there be other than knowledge?

MR HUNT:

If you knew about undue influence?

ELIAS CJ:

Yes. I mean you might ask for particulars of evidence in relation to that but in terms of a pleading why wouldn't knowledge be sufficient?

MR HUNT:

Well, it's a question of what the solicitor did in that given case, if they have highlighted their concerns in relation to the influence to all of the relevant parties who have a particular, the testator or anyone who they think is in control of the affairs, then it may be that that's a will that still needs to be made. But my point would be the plaintiffs had every opportunity to properly plead this case and to put up evidence, which is the knowledge really saying, well, what is the knowledge of the undue influence because we've had a look at that, the page that's missing which is the undue influence pleading doesn't satisfy any pleading that the law firm knew of the undue influence and we say that having had every opportunity to properly plead it through High Court, Court of Appeal and now being here, and you might note that the Court of Appeal allowed my learned friend considerable chance to explain by way of his written and oral submissions just what the dishonesty was and it was still completely unsatisfied that any of that created an inference taken singularly or cumulatively of dishonesty. So my submission would be it's too late.

ELIAS CJ:

Well, I'm still feeling for what sort of particulars beyond knowledge you would be looking for.

MR HUNT:

Surely he'd have to put up, I don't want to sell his case for him, but the law firm was present on these occasions when these indicators of undue influence were present and that would be the kind of particulars you'd see.

ELIAS CJ:

That's evidence rather than pleading but anyway I understand that it is very light on detail and that's really the point you're making. I think you'd better take us, because I remain sceptical, to this judgment of Justice Randerson.

MR HUNT:

Right, I will go there. Now the second – sorry, it's the second point on dishonesty is summary judgment and we just stress that it's an objective assessment, the dishonesty test, that you're looking for positive acts, not necessarily omissions and that weighing up what Ms Paul did in this case, and she's given evidence of all the steps she took, she highlighted a potential capacity issue, she got a doctor's certificate, she got another lawyer involved to give independent advice and he came to the same conclusion as her, that putting that factual context up and contrasting that with nothing which coherently or cogently spells an inference of dishonesty means that summary judgment was properly available and properly granted in this case.

ELIAS CJ:

But the evidence you're referring to has not been tested and on your approach you'd never really – well, there'd be a very broad category of case in which you wouldn't have to go to trial because you're really saying that the Court is in a position to be satisfied that trial would make no difference.

MR HUNT:

Yes, I'm saying you can look at what the solicitor did here. We can look at the evidence that Ms Paul's put up of the steps she took, the letters she wrote, the statutory declaration that she had signed and that creates, that gives you the full picture. Unless the plaintiffs have something else, unless there's something else to this that –

ELIAS CJ:

Well, unless they want to ask her questions about what happened.

MR HUNT:

Well, that's where we say they would have to be based on, other than just being a series of propositions, if there's any evidence that it underscores doubt to what Ms Paul is saying that should have been put in the affidavits and –

ELIAS CJ:

Well, they may not have evidence. Well, they don't have to have evidence, do they?

MR HUNT:

No, well, in that situation then I say that this Court can properly say we've looked at this and we're looking at objectively what a solicitor would do in this situation and we don't think that any, there is a realistic risk of that, of the solicitor being found dishonest here. And I mean in all of the dishonest assistance cases there's generally quite a strong –

ELIAS CJ:

So, sorry, is that the test that you're suggesting for summary judgment that there's no realistic chance of success? It's probably right.

MR HUNT:

Yes. I mean I'd contrast it to say the *Eden Refuge Trust v Hohepa* [2011] 1 NZLR 197 (HC) case which is another solicitor's dishonesty case and there

the lawyer, Mr Fletcher's, getting emails from Mr Hohepa who's in Spain asking him to pay his hotel bills out of the church's money. You know, it's a very clear case and the evidence of dishonesty is very clearly before the Court. Here we can see what the lawyer did, can see in my submission that she was very careful, she was alert to the risks, addressed them all and this is a proper case where you can confidently say there will be no finding of dishonesty.

So that's the synopsis. I did want you just to a couple of the documents which I think are significant and these are all in volume 3 of the case on appeal and the first one is 137 which is the second will and it's contrasted to 101 which was the first will and a notable omission is that Vicky was taking $200,000 bequest under the first one and that's gone in the second. I just simply highlight that as just a background context for this allegation of undue influence.

You will have read these but at 131 and 136 are the powers of attorney and noted for Mr Millet, and this is on 131 I'm looking at it at point 5 saying, "I have no reason to suspect the donor was or may have been mentally incapable at the time she signed the enduring power of attorney form." So that appears on both of those enduring powers of attorney.

The next document –

GLAZEBROOK J:
So can you just – 131, did you say?

MR HUNT:
Yes, 131 and 136. One's for personal care and the other's for property.

The next document is 108 which is a – I just want to highlight just a paragraph from this letter that the firm wrote to Mrs Sandman and about seven lines down in the second paragraph, "We note you" –

GLAZEBROOK J:
Sorry, I missed the page number.

MR HUNT:
108.

GLAZEBROOK J:
108, thank you.

MR HUNT:
And about seven lines into the second paragraph, "We note you are concerned that due to the fact that you have been and will continue to support Mark who is unemployed that Vicky is disadvantaged by your will. As you are aware Vicky at your request was present at this meeting. She did not want you to alter your will in her favour based on current circumstances." So two things there. One is obviously that Vicky's again encouraging her mother not to give her anything further but secondly Mrs Sandman is the one who wants Vicky there in case or my friend's suggesting that Vicky's presence should be regarded as a bad thing.

114 is a doctor's certificate which you will have seen. 121 –

ELIAS CJ:
So there is the reference to, "Until your health issues are identified and resolved you won't enter into another will."

MR HUNT:
Sorry, where's that?

ELIAS CJ:
Sorry, at the end of the first paragraph.

MR HUNT:
Of?

ELIAS CJ:

Of 108.

MR HUNT:

Well, Mrs Sandman had been in for various operations. All of that's set out in…

ELIAS CJ:

Yes, and there was the medical material that indicated that she was suffering from some confusion at that time.

MR HUNT:

Yes.

ELIAS CJ:

But it does look as if they're not saying they're not going to be looking at a new will. It's just it's not appropriate at that time.

MR HUNT:

Yes, this is Feb – sorry?

ELIAS CJ:

February.

MR HUNT:

Yes, mmm.

ELIAS CJ:

No, I understand that.

MR HUNT:

121 is the last paragraph. I just refer to that as some of the examples of the financial assistance that Mr Sandman had been getting during Mrs Sandman's life. He got a weekly allowance, $300. She paid for all his body corporate, local authority rates, telephone, electricity.

ELIAS CJ:

On what basis do you say we should be taking this into account in a summary judgment hearing?

MR HUNT:

Just purely factual context.

ELIAS CJ:

Yes, but how does it bear on the issue for determination on summary judgment?

MR HUNT:

It doesn't directly bear on the evidence because we say that the key evidence is whether or not there's been dishonesty and whether or not there's a trust. So I don't accept that that's – it's not directly relevant to –

ELIAS CJ:

And whether or not there's capacity.

MR HUNT:

Yes. Capacity and standing, whether or not there's a, you need to have a trust and whether the power of attorney has what causative link to the will are the three key issues from that and I accept this doesn't directly bear on those. Then there's the, at 142 is the statutory declaration which in my submission is relevant because it shows a solicitor who's being very careful to have as a record why Mrs Sandman was changing her will and that speaks for itself.

Next is 155 which is where Dr Buckley does or provides a certificate saying that Mrs Sandman did not have capacity and this is in August 2012, so some two years almost after the medical certificate which she gave in relation to the will and certainly well over a year after the 2010 will was signed.

169 is Mr Sandman writing to Wilson McKay, "I have just written to Michael Foley," that's his lawyer, "telling him I am happy with the will," and we

just put that in there because it goes hand in hand with the next document which is 176 which is the consent to distribution. It's aligned to our submission that Mr Sandman has an adequate remedy in this case and that if he's concerned about distribution that's something he had a hand in and a say in.

ELIAS CJ:

So again how do we take this into account in this hearing? What's the relevance?

MR HUNT:

Well, the relevance is simply we say equity doesn't need to intervene in this case which would be –

ELIAS CJ:

Well, that might be a submission for a substantive hearing. How does it help in terms of the summary determination?

MR HUNT:

Just on the, whether or not the elements of the cause of action have been satisfied here which is relevant to my submission to both strike out and summary judgment. We say that they are not because he doesn't have standing and there isn't a trust and it – so the Court could give strike out or summary judgment on those bases and that if it wasn't to it would be acknowledging that the cause of action could be extended in those ways and my submission is it doesn't need to extend the cause of action to create equity or justice in this case because he already has this cause of action.

ELIAS CJ:

I'm not sure that I understand that but…

GLAZEBROOK J:
Well, isn't really your strongest point that there isn't a trust here so there isn't anything whatsoever that we need to go down to get to extend or whatever because if there isn't a trust how can there be dishonest assistance?

MR HUNT:
Yes, if –

GLAZEBROOK J:
And that's a strike out point.

MR HUNT:
That is one of our two main planks, yes. So I'll go to the next one which is – I don't think I need to go through the evidence. We've discussed that. I was going to take you to those affidavits. So I will do that. The affidavits are firstly James Langton and he's at volume 3-236. Now Mr Langton was a friend of Vicky's. He knew Mrs Sandman. He's not medically trained. He wasn't there when the power of attorney was signed or when the will was signed but he says he went and visited Mrs Sandman the afternoon of that day in December 2010 and at paragraph 6 of that affidavit on 237, "Liz told me she had received a visit from some lawyers, but had no idea why they had come to see her." So we say, well, it doesn't go to the knowledge of Wilson McKay.

The next affidavit is at 240 which is Ms Siganporia and she is employed by NZ Guardian Trust and she received notification 3 June 2010 from Vicky Sandman that Mrs Sandman, sorry, that Vicky would now be doing the tax for her mother, that she had a power of attorney. I think it's in there to show that Vicky was taking control but in my submission that's just the ordinary incidents of a daughter assisting her elderly mother and it certainly can't create the foundation for an inference of dishonesty.

Michael Daniel is the next one. He's at 242 and my summary of that is he paid for some surgery which Mr Sandman needed in 2010, so I don't really see how that has anything to do with the knowledge or dishonesty of the firm.

ELIAS CJ:
Well, why are we going to it then?

MR HUNT:
I just wanted you to understand what it is that my friend says is the evidence –

ELIAS CJ:
I see, sorry, yes.

MR HUNT:
– that was excluded unfairly. My submission is that this doesn't change anything in or out.

James Mitchell is the next one. He's at 244. Again, not medically qualified and he says it was inappropriate for Mrs Sandman to give Vicky a power of attorney in December 2010 and in my submission doesn't go to the firm's dishonesty and the last one is Gary Gotleib. He's at 246. So he's a lawyer who gives some evidence about Mr Sandman's state of health so again I submit it's irrelevant.

I just wanted to take you through those so you understood what they were. I won't take that point any further.

So turning to the issue of standing, we say that if this is an accessory cause of action then the remedy must be provided for under the principle breach. Essentially the cases are about a stranger who's liable for a fiduciary breach. Now here that would be Vicky's breach in relation to Mrs Sandman and that doesn't give Mr Sandman any benefit. So whatever remedy Mrs Sandman might have had for Vicky if there had been all of the things that they say happened here, he's not a beneficiary of that and so his accessory cause of action must fail on that ground.

There are a couple of cases which we submit are relevant to that. Before I go to the *Knox v Till* [1999] 2 NZLR 753 Justice Randerson cases, the first is

Hills v Public Trust BC201060779. Now this case is at respondents' bundle of authorities volume 1 at 184.

O'REGAN J:
134 it is in the bundle.

MR HUNT:
Yes, and I'm looking at paragraphs 160 and 161. Now in this case the complainant –

ELIAS CJ:
Sorry, is that 1-3?

MR HUNT:
Sorry, 160.

GLAZEBROOK J:
Page 184.

ELLEN FRANCE J:
That's 134 as I make out.

MR HUNT:
Yes.

ELLEN FRANCE J:
134.

ELIAS CJ:
161, was it?

GLAZEBROOK J:
I was on 184 on conflict on interest, was it?

O'REGAN J:

No, in the – you've got the appellant's bundle.

ELIAS CJ:

I thought you said the appellant's.

O'REGAN J:

No, respondents' volume 2, page 184.

MR HUNT:

Volume 1, yes. So in this case a complaint had been brought by someone who was a residuary beneficiary under a trust that was in effect during the deceased's lifetime and the Court said, "Well, you have standing to bring a complaint because you're a residuary beneficiary," but there were also causes of action which covered what the deceased with his own affairs during his lifetime and that's what 160 deals with. Counsel, so, "Mr Judd, counsel for the second defendant, submitted that the plaintiff does not have standing to make any claims in respect of the personal affairs of the deceased. He submitted that any claims alleging wrongdoing or seeking to recover loss in respect of Norah Hills' personal funds or assets or in relation to the handling of the estate, are claims that would have to be brought by the Public Trust as her executor," and Justice Potter agreed with that submission. So we say that's authority for if any challenge to what Mrs Sandman did whilst she was alive is for her estate to bring. It's not for Mr Sandman as a possible beneficiary under her will to bring.

ELIAS CJ:

Well, the appellant is not seeking to assert a direct cause of action as I understand it but if he had been I would have thought you needed to deal with the cases on negligence because that's really more what they are dealing with.

MR HUNT:

Okay, well, that –

ELIAS CJ:
So I think the idea that a claim could only be brought by the executor strikes me as too restricted against that background of a direct claim.

MR HUNT:
The other authority on that point is *Vernon v Public Trust* [2016] NZCA 388, [2016] NZAR 137 which is – I won't take you to it but that's at volume 1 of the respondents' bundle of authorities at 294 and that just simply confirms that to challenge what actions were taken under a power of attorney during a lifetime that action is brought by a trustee. Again it's a similar point that we're making there that Mr Sandman wouldn't have standing to bring a case challenging what actions were taken during the lifetime.

Now the Court of Appeal in referring to standing did at 24 and 25 of its decision footnote some cases which it said supported that Mr Sandman has standing and they're just some cases we've addressed in our submissions at paragraph 51 and our submission essentially is that these are quite different and it's a point that was really borne out in the questions from Your Honour, Justice O'Regan, as to what authority was there for the proposition that duties were owed in advance of the trust coming in, what authority was there for a trust being in existence prior to death and all of these cases that the Court of Appeal referred to which were *Burgess v Monk*, *Sadler*, *Re Stewart* [2003] 1 NZLR 809 (HC), and *Simpson v Walker* are all about deceased estates.

But we say that even the *Simpson v Walker* case in fact has some support for what the respondents are saying so in that case, and *Simpson v Walker* is appellant's bundle of authority volume 1 490, in that case two daughters sought to challenge deeds of family arrangements, it's a case that my friend took you to, during their father's lifetime. The Court of Appeal held they'd not have standing to challenge the deeds. Such an application would need to be brought by the father. So that is covered in paragraph 46 of that judgment. This is where the Court of Appeal set out the issue of standing. So this is standing to challenge a deed of family arrangement that was entered into during the lifetime of the then deceased person. "We do not agree that

Harrison J was wrong to refuse to set the deeds and other transactions aside. As to the standing point, we consider that Harrison J was right that this Court's decision in *Scott v Wise* precludes Diane and Pamela from challenging the validity of deeds: any challenge must be brought by or on behalf of Alan," who is the deceased. So we say that's consistent with out submission that Mr Sandman didn't have standing here.

But if I now do go to those negligence cases. So –

ELIAS CJ:
That would be if he were seeking to restore to Mrs Sandman property that had been taken from her in breach of trust or fiduciary duty, would it?

MR HUNT:
If Mr Sandman were seeking to restore to Mrs Sandman property that had been taken in breach?

ELIAS CJ:
Yes, yes, or to her estate. This is authority in those circumstances, is it?

MR HUNT:
No, this is just saying that the people who have – this is a voluntary disposition that Alan made during his lifetime.

ELIAS CJ:
But it would have augmented his estate, wouldn't it? It wasn't a direct claim.

MR HUNT:
Yes, it would have augmented the estate.

ELIAS CJ:
And they say it's not one that the daughters had standing to bring.

MR HUNT:
That's right.

ELIAS CJ:

Yes. But the effect would have been to augment the estate, whereas here rather oddly since it's not a direct claim we have a claim for damages brought by the plaintiff.

MR HUNT:

Yes, my submission based on this authority would be if anyone wanted to augment the estate –

ELIAS CJ:

Restore to the estate, I suppose, yes.

MR HUNT:

– restore because of actions taken during the lifetime that's something for the estate, the executors to bring. They're the parties suffered the loss and most likely they're the party to whom the duties were owed which would have been breached in relation to the dispositions.

Anyway *Knox v Till* is the first case which is respondents' bundle of authorities, volume 1, at 200. So it's probably convenient just to start at the –

GLAZEBROOK J:

Sorry, if you could just give me a moment to – yes, I've got it. 200?

MR HUNT:

200, respondents' volume 1. So this is the Court of Appeal, Justice Henry, and in this case there'd been three relevant wills. Will 1 stood but the later wills 2 and 3 had been challenged on the grounds of incapacity and had been set aside. I think it was a decision of Justice Penlington. So the residuary beneficiaries under will number 1 brought a case against the solicitors who drafted wills 2 and 3 saying that they had been negligent and it was for the costs that they'd incurred in challenging wills 2 and 3. So in my submission it's similar to if Mr Sandman in this case got an order that the 2010 will was invalid and then brought a case against Wilson McKay saying, "You owed a

duty to me not to allow that will to be executed and I've suffered a loss which is all the costs I've incurred in challenging the will."

And the first paragraph I would like to take you to is 3 because this highlights the point that Justice Glazebrook made earlier which is this difficulty framing the duty of care. And it can't just be, it says there just about two sentences in, "The particular duty of care was framed initially as a duty to take reasonable steps to ensure that the testator had testamentary capacity. The breach of such a duty would however on its own be insufficient to found the present cause of action in negligence. It must be the appellants' case that a solicitor must not only take steps to ensure there is testamentary capacity, but also having ascertained its absence, to refrain from preparing a will as instructed. Absent that duty, and its breach, there would be no entitlement to the damages claimed."

So the duty must therefore be to avoid the execution of wills and Justice Henry then says at paragraph 4 how that creates difficulties and there's no authority for such a proposition, and then about – just at line 34, "There is in general an obligation to carry out a client's instructions. The situation now under discussion," well, "In the situation now under discussion no qualifying factor, such as illegality, unlawfulness or breach of ethical responsibilities arise to negate that duty. The giving of advice on the question of testamentary capacity, and recording of that advice, which would appear to be possible appropriate responses to a situation where capacity is apparently in question, are far removed from a positive refusal to act. Furthermore, whether or not a person has testamentary capacity is outside the areas of a solicitor's professional expertise. That issue cannot be likened to preparing a will which gives effect to the testator's intentions, and to ensuring that is duly and timeously executed according to law."

So that I think is a reference to, for example, the *Gartside* case where the instructions of the testator align with the interests of the beneficiary. You didn't execute that will in time so I have lost out. But here we've got a conflict between what the testator wants and what the beneficiary wants.

ELIAS CJ:

Well, arguably, but if it's a testator without capacity arguably the testator's intent is as expressed in the earlier will. It just doesn't seem to me to be quite as clear as it's being put here.

MR HUNT:

Well, I think that the key point is that the Court's prepared to recognise a duty of care where there's an alignment through the testator's instructions and the interests of the disappointed beneficiary, that that's, everyone's on the same page and we can recognise that, but where –

ELIAS CJ:

But where you have lack of capacity the alignment may be with the earlier expression of testamentary will.

GLAZEBROOK J:

Is the issue perhaps whether there's a duty nevertheless to the beneficiaries of the earlier will as against to the testator him or herself?

ELIAS CJ:

Well, I don't – I'm not sure that there's – I see.

MR HUNT:

There's a conflict there, isn't there?

ELIAS CJ:

There may be. There may not be though. It may be the same if the testator's competent intention is in respect of the first will.

MR HUNT:

It's a very difficult –

ELIAS CJ:

It just seems a bit black and white, that's all.

MR HUNT:

Well, I think the point is that the principle duty of a solicitor is to carry out the client's instructions and those can't fall into conflict with other people who potentially have a benefit under that will. Then the solicitor's in a terrible position not knowing which way to turn. So where that conflict arises there's no duty to these other people. The duty is simply to the testator and it may be that if there's a lack of capacity and a lawyer doesn't do enough s –

ELIAS CJ:

No, I would rather put it on the basis that the duty is always to the client.

MR HUNT:

Yes.

ELIAS CJ:

But if you have a client who lacks capacity there may be an issue as to what performs your duty to that client.

MR HUNT:

Yes.

ELIAS CJ:

Leaving aside the concern that Justice Glazebrook rightly has about the solicitor being put in that sort of position, but I think it's – I don't see it as a conflict in terms of to whom the duty is owed.

MR HUNT:

Well, it's not from the way you just put it because that's the duty to the client.

ELIAS CJ:

Yes.

MR HUNT:

And I agree that it can be framed in different circumstances in different ways, but there's not a duty to somebody else.

ELIAS CJ:

No. And indeed in the *Gartside* case and the other English cases the duty doesn't really arise until the testator is dead.

MR HUNT:

Well, I guess that's right but if there's a duty to get a will executed that does, that pre-dates death.

But paragraph 5 is interesting because this goes to, I think, the very point we're dealing with in this case, "The difficulties are further compounded. The duty here is claimed to be owed to the beneficiaries of the estate, whoever they may be, at the date of consultation," and the Court is reluctant to extend a solicitor's duties to persons other than a particular client is well known, so I think that – and then there is a discussion of *Gartside*.

And then at 6, "All of these factors combine to lead us to the clear view that the claimed duty should not be recognised as sustainable so as to found an action in negligence."

So our submission is that if a duty is recognised in equity to Mr Sandman in this case it'll really give him a back-door entry to bringing this kind of case which he can't bring. The solicitor doesn't owe him a duty and really in attacking the lawyer as he's done in this case he's circumventing the difficulties that would be presented in a tortious claim by reference to equity which in my submission doesn't justify the intervention at equity.

Now that wasn't the end of the *Till* cases because Mr Parmenter who was counsel for the Tills then brought an action in the High Court and this is the Justice Randerson decision which is volume 1 of respondents' bundle at 231. So it's the same case but here the plaintiff is the Public Trustee, the executor, not the residuary beneficiaries, and perhaps the first interesting point to note is the way in which at paragraph 8 counsel attempted to reframe the duty. Obviously in the face of the Court of Appeal decision saying there was no duty then he needed to work his way round that.

GLAZEBROOK J:
Sorry, I think I'm on the wrong – which case are you referring to?

ELIAS CJ:
231.

MR HUNT:
I'm in *Public Trustee v Till* [2001] 2 NZLR 50 which is respondents' bundle of authorities at 231, and I was – the introduction is just simply outlining the background to it but at paragraph 8 Justice Randerson looks at was there a duty of care and sets out the way in which it had been framed in the proceeding. So to consider testamentary capacity and then, "Where grounds existed from which to infer a possible absence of testamentary capacity, to advise the testator thereof as to the consequences of any lack of capacity," and then he goes on to say at 9 no case is cited to support this duty. It's quite different from *Ross v Caunters*. *Ross v Caunters* was where the solicitors had allowed a beneficiary to be the witness and that meant that the will was of no effect and that disappointed beneficiary was entitled to a remedy. Again the point being that there's an alignment there between testator's interests and what the intended beneficiary wanted, and he says this case is quite different.

At paragraph 11 he refers to the earlier case of *Knox v Till*. He says that, "His Honour, delivering the judgment of the Court, observed that the assessment by a solicitor of testamentary capacity 'cannot be likened to preparing a will which gives effect to the testator's intentions, and to ensuring it is…timeously executed according to law.'" So again it's that distinction between those cases, and then in my submission that 12 is an important paragraph on the solicitor's obligations and highlights the last sentence, the potential conflict, if the solicitor was to refuse to carry out the instructions it would itself be a breach of the duty to the client. So I think that does emphasise that we're really looking here at duties to the client, not duties to others.

Paragraph 24 is an interesting discussion of solicitor's duties and the one that I'd like to draw your attention to is at (f), 24(f), "Presumably, the solicitor would then," this is – it leads on from (e) which is inquiries confirm –

ELIAS CJ:
Sorry, I missed the reference. Where are you taking us to?

MR HUNT:
Sorry, I'm at paragraph 24 of the judgment at subparagraph (f), so it's on 238 of the bundle, and so (f) leads on from inquiries confirm lack of testamentary capacity and raise doubts about it, what is the solicitor to do then? "Presumably, the solicitor would then be expected to raise the issue with the client, but what is a solicitor's duty if the client's instructions are to proceed with the will in any event? Here, I am clear that the solicitor's obligation is to proceed with the execution of the will as instructed unless coherent instructions cannot be obtained or the client is so obviously mentally defective that the instructions could not truly be regarded as instructions at all."

And then I think in my submission 25, 26 and 27 are all important paragraphs in this judgment. The duty to consider testamentary capacity is constrained by the scope of the retainer and is limited by the solicitor's fundamental duty to comply with the client's instructions. 26, a solicitor is generally bound to follow the client's instructions and could not decline to proceed with a will except in the exceptional circumstances already discussed above as to illegality, breach of ethical obligations or where a client is so obviously lacking in mental capacity the instructions are not truly instructions at all. "A solicitor must also be conscious of the duty to proceed with due expedition, especially where the client's circumstances are such as to suggest urgency," and then he makes the point that solicitors don't have expertise in testamentary capacity and that possibly that, he says, "The most that could be expected," at 27, "of a reasonably competent practitioner is the ability to recognise possible warning signs such as advanced age, ill health, irrational behaviour, disorientation, clear signs of lack of understanding, or plainly defective recollection of assets or family members. Even then, a reliable assessment of

testamentary capacity could not be made without expert medical advice undertaken with the client's authority." But here, of course, we have medical evidence. At –

ELIAS CJ:

Just pause. So the effect of this is that you don't have to make inquiry but Justice Randerson does say that if someone obviously lacks capacity and the allegation here is that the solicitor knew of the lack of capacity. I'm not cavilling about the evidence and whether it's sufficient for the moment. I'm just trying to look at this as a matter of pleading. The pleading is that the solicitor knew that the testatrix lacked capacity to make a will. That would seem to be within the scope of what Justice Randerson is saying could give rise to liability.

MR HUNT:

I'm not sure the pleading does say that. It just says that there was dishonest assistance.

ELIAS CJ:

Well, should – I think it's quite important to tie that down so perhaps you should take me to it and indicate that.

MR HUNT:

So the statement of claim is at case on appeal, page 18, and the key paragraphs are at 23, page 23, paragraphs 23 and 24, the second defendant knowingly assisted Vicky and/or Mr Giboney obtain control of the affairs of the deceased and in particular the execution of a will.

GLAZEBROOK J:

Well, it's probably more paragraph 16 because it relates to actual knowledge of what's particularised in subparagraphs (a).

MR HUNT:

And that's what the Court of Appeal went through each one of those and we can do that here. So (a), or 5(a).

GLAZEBROOK J:

Well, (a)'s relative, but (a)'s irrelevant.

MR HUNT:

Yes, so in my submission you go through each one of those and you don't get a foundation for a cogent inference of dishonesty and that's what the Court of Appeal did. (b)'s just a signing of power of attorney in 2007. (g), Vicky got a brain tumour.

ARNOLD J:

Well, one where the inability to comprehend or understand is really paragraph 6 which isn't part of 16.

GLAZEBROOK J:

And that doesn't seem to be referred to explicitly under the knowing assistance or is it?

MR HUNT:

No, it's not. It's not. The knowing assistance is limited to paragraph 5.

ARNOLD J:

Yes, that's right.

GLAZEBROOK J:

Which are all just nothing to do with capacity.

MR HUNT:

As the Court of Appeal said, if you look at them individually or cumulatively you cannot get an inference, a proper inference of dishonesty out of those.

ELIAS CJ:

Or knowledge of incapacity.

MR HUNT:

True.

ELIAS CJ:

Because as I've indicated I don't think it's a huge step if you had knowledge of incapacity to get to dishonesty myself but…

MR HUNT:

No, but in terms of knowledge of incapacity I…

ELIAS CJ:

There's no pleading of it.

MR HUNT:

There's no pleading and what we do have is a medical certificate.

ELIAS CJ:

No, I understand.

GLAZEBROOK J:

There is a pleading of knowledge of undue influence probably if you look at 23 and 24.

MR HUNT:

Yes, but we don't know what the assistance is or what the knowledge is.

GLAZEBROOK J:

No, no, I understand. I was just indicating.

MR HUNT:

It's just a, it's a vanilla accusation. Yes.

So that probably covers Justice Randerson's decision and the basis on which we say that tort wouldn't recognise a duty here in favour of Mr Sandman and that supports our proposition that he shouldn't be given standing in equity.

Now the next sort of argument is the one that we've mentioned which is that there's simply no trust here and I think that's properly set out in our submissions. We refer to the *Burmeister v O'Brien* (2009) 12 TCLR 539 (HC) case where Justice Asher, this is at 58 of our submissions, says it is not necessary for there to be assistance of a breach of an express trust for a claim to be established. It is sufficient if the breach is of a fiduciary duty arising out of a constructive trust. And our submission would be you need some kind of trust, even if it's one that's created as a remedial constructive trust due to the breach but here we can't have that because the property rights only come into effect once the will is in effect.

The next key point is, and I'll just be brief on these because I think the Court's understanding where we're coming from, is the point that I've made that there's a disjunct here, a causative disjunct, between alleging that there was a breach of a fiduciary duty under a power of attorney and the execution of the will, and it's simply not clear how those two, certainly on the pleadings, come about and it's perhaps another one we could look at the pleading on which the pleading of undue influence is at page 22 of the first volume and at paragraph 12 in my submission it's similar to reading through that paragraph 5 we read through before. You can't extract out of that how the firm or what the undue influence precisely was and then how the firm has knowingly assisted in that.

The case which we say has some relevant here is *Ganderton v Behre* HC Rotorua CIV-2004-463-614, 23 September 2005, a decision of Justice Venning, and he just makes the point that has been made many times that not every breach by a fiduciary is a breach of fiduciary duty. So just because Vicky is in a power of attorney situation it can't be that everything she's done is in breach of a fiduciary duty. It has to be a breach that has the characteristics of exercising the fiduciary duty and in my submission the

particulars that are in paragraph 12 don't draw a clear line between breaching of a fiduciary duty as a power of attorney and the will.

The next issue I just wished to briefly touch on was dishonesty and strike out but I think I've – there was just one authority that I wanted to take you to on that which is the decision of *Schmidt v Pepper New Zealand (Custodians) Ltd* [2012] NZCA 565. Now this is a decision which we refer to in our submissions at 82. It's in respondents' bundle of authorities volume 1 at 291, and at paragraph 15 of that judgment, which is on page 291, Justice Harrison in the Court of Appeal sets out what in my submission is a good summary of what pleadings should be in relation to dishonesty. So, "Allegations of fraud or dishonesty are very serious. They must be pleaded with care and particularity. As the authors of Bullen & Leake & Jacobs *Precedents of Pleadings* emphasise, counsel must not draft any originating process or pleading containing an allegation of fraud unless they have reasonably credible material which, as it stands, establishes a prima facie case of fraud – that is, material of such a character which would lead to the conclusion that serious allegations could properly be based upon it. Fraud cannot be left to be inferred from the facts – fraudulent conduct must be distinctly alleged and as distinctly proved."

So our submission is that inference isn't enough and that's clearly what the plaintiffs or the appellants are seeking here is to put up a series of facts and ask the Court to infer dishonesty from that and in my submission they have to go further and having had the opportunity to do so and not gone further the Court here can properly reach the conclusion that there is no properly pleaded allegation of dishonesty and therefore the proceeding can be struck out.

I'm conscious of the time but I'm very close to the end.

ELIAS CJ:

How much longer do you think you will require?

MR HUNT:

Five minutes.

ELIAS CJ:

Yes, how long will you be in reply, Mr Dillon?

MR DILLON:

I anticipate only about an hour, depending on the questions.

ELIAS CJ:

An hour? All right, we will take the lunch adjournment now. Thank you.

COURT ADJOURNS: 12.59 PM

COURT RESUMES: 2.17 PM

MR HUNT:

I just had a couple of very discrete points to make before I conclude. The first is just following on from the authority I referred to on dishonesty which was Justice Harrison, Court of Appeal, in *Schmidt*. The next authority is the House of Lords case of *Three Rivers DC v Bank of England (No 3)* [2001] 2 All ER 513 which discusses pleading in relation to dishonesty in some detail. So this is respondents' bundle of authorities volume 2 at 451 and I've jumped to page 529 of the judgment which is paragraph 51 and there's quite a discussion on dishonesty for the next two pages, which I won't go through all of it, but 51, "On the other hand it is clear that as a general rule, the more serious the allegation of misconduct, the greater is the need for particulars to be given which explain the basis for the allegation. This is especially so where the allegation that is being made is of bad faith or dishonesty. The point is well established by the authority." It goes on to quote from *Wallingford v Mutual Society* saying that general allegations are not enough. And there is reference over the page in 55 to a lack of particulars justifying strike out so followed in – and some of this is actually included in our submissions from (d) at paragraph 55, "A party is not entitled to a finding of

fraud if the pleader does not allege fraud directly and the facts on which he relies are equivocal. So too with dishonesty. If there is no specific allegation of dishonesty, it is not open to the Court to make a finding to that effect," and then further down towards the end of that paragraph, "Of course, the allegation of fraud, dishonesty or bad faith must be supported by particulars. The other party is entitled to notice of the particulars on which the allegation is based. If they are not capable of supporting the allegation, the allegation itself may be struck out." So we say that that very much applies to the pleading that we are looking at at the moment.

On the summary judgment issue of dishonesty, as I've said in my opening, we stress that it's an objective test, that here we are able to look at the solicitors' file and see what they did. The Court in *Hohepa* referred to the decision of Lord Nicholls when he was talking about dishonesty in the *Tan* case and stressed that it – looking at advertent conduct, not inadvertent conduct, and here there are, in my submission, there are a number of steps which the solicitor has taken which, when assessed in light of the obligation of a solicitor which we can see through cases such as *Till* and *Knox*, lead to the objective assessment this has been a very careful process and I just refer then to the doctor's certificate, Mr Mellett giving, independently certifying capacity, a statutory declaration and Ms Paul's evidence that Mrs Sandman had capacity or her observation was that she had capacity when giving her instructions.

Now then in my submission we'd need to see something, some cogent evidence which was to the contrary which supported dishonesty and the Court of Appeal went through that process in quite some detail.

ELIAS CJ:

Where do you get that from, cogent evidence, because the *Three Rivers* case simply looks at pleadings and says, well, it doesn't matter that it's not so clear that in the end it won't be found at trial to be negligence, so where do you get that?

MR HUNT:

Well, the *Three Rivers* is a point that I'm making in relation to strike out, saying that's simply –

ELIAS CJ:

Yes, but where do you get the cogent evidence?

MR HUNT:

That's on summary judgment where we're saying –

ELIAS CJ:

Well, no, summary judgment is that it isn't spurious.

MR HUNT:

What I'm saying is that you can look at this with an objective assessment of the case and on one side you have the solicitor and a number of contemporaneous documents all of which are contrary to a finding of dishonesty and it's more just a matter of my submission to say that should justify summary judgment and that to justify keeping this case before the Court in my submission there should be something which questions that conclusion and that's what I'm saying is absent in this case.

ELIAS CJ:

What sort of thing could there be in a case like this? I don't mean this particular case but what could there be if someone alleges that it was known that an instrument was entered into under undue influence, for example?

MR HUNT:

Well, maybe the solicitor was present when the daughter's exerting unfair pressure on her mother. There's a world of possibilities but –

ELIAS CJ:

But the solicitor's there. You actually do have the solicitor present when the will is signed.

MR HUNT:

Yes.

ELIAS CJ:

So you at least have that background.

MR HUNT:

Yes, but there's –

ELIAS CJ:

You do have a background of impairment. You have the assessment of Ms Paul that she was nevertheless capable but that hasn't been tested. What realistically could be put up?

MR HUNT:

Well, in my submission there'd be some evidence of what is the undue influence? What actually did Vicky do to influence her mother?

ELIAS CJ:

But they won't be there. Very often they won't be there. But it –

MR HUNT:

Well, there must be some evidence to justify that allegation.

ELIAS CJ:

Well, there might be just the circumstances. I'm not saying that it would be enough to get home at trial. It may not be. But just how do you get your day in Court?

MR HUNT:

What are they going to prove at trial when they say, right, here's the undue influence. This is – there must be. This is what Vicky did to Mrs Sandman to influence her unduly. We don't have that and that's the first step. What was the undue influence? The next step is what's the assistance that the law firm

provided with that, and again we don't really have that, and then on top of that comes the knowledge which is – which creates –

ELIAS CJ:
We do, don't we? We do because they're indicating that it's simply in the preparation and attending to the execution of the will. That's really all it comes down to.

MR HUNT:
Well, if that's it then my submission is you can look at that objectively and go that's not dishonesty.

ELIAS CJ:
All right. Why do we ever have the trials?

MR HUNT:
Well, because there are some times it'll be a much more complex situation and there'll be allegations which really do require the evidence and looking at the witnesses and assessing it, but here we've had the solicitor fully explain its position and there isn't anything which, that's my word cogent, cogently leads to a questioning of that, so…

So the Court of Appeal went through all of those particulars in paragraph 5 of the statement of claim and they assessed whether or not that would create a factual foundation from which an inference of dishonesty could be taken and in my submission correctly concluded that those did not support such a conclusion. Our submission would be inferences isn't enough anyway but that's more the strike out point.

Your Honours, that really is all I have so unless you have any questions for me I'll pass it back to my friend, thank you.

ELIAS CJ:
No, thank you. Thank you, Mr Hunt. Yes, Mr Dillon.

MR DILLON:
Given the concern that was expressed just before lunch, I'll try and be less than an hour.

The first point really is the pleading point and it seems necessary to work through the statement of claim in some detail just to ensure that the Court does appreciate how the bits stack together in terms of dishonesty assistance. The pleading against the firm is on page 23 of the bundle and it starts by repeating everything that's gone before in the statement of claim and then particularises some actual knowledge by reference to paragraph 5 of the claim and identifies –

GLAZEBROOK J:
None of that seemed to be knowledge in paragraph 5.

MR DILLON:
Well, if I can just go through those steps because then we can go to paragraph 12 which is about the undue influence side of things and there is some crossover between those points and then come back to the principal pleading in relation to the firm.

Point (a) is simply that there is an existing enduring power of attorney in 2007. Point (b) is a chronological sequence.

GLAZEBROOK J:
But what's that got to do with anything?

MR DILLON:
Simply that there was one of these documents already in existence, admittedly in favour of Vicky, and to the extent that subsequently it was apparent that Vicky was going to die there was a need for something to substitute for that. That's acknowledged. But again this is just a matter of working through the chronology of the firm's knowledge and these things are cumulative.

So the first point is there's an existing power of attorney. It's effective and it's not limited to Mrs Sandman's incapacity.

The second point is the certificate of that very document so that Vicky can take control of Mrs Sandman's bank account. That is 5(b). Now the certificate comes from Ms Paul. So we have the 2007 enduring power of attorney with her actual knowledge of the existence of it and knowledge of the reason, namely that Mrs Sandman can't control her own finances or is having some difficulty with that and that's right at the beginning of 2010.

The next item is pleaded specifically against the firm's item (g) and that's that Vicky is diagnosed with the brain tumour and Ms Paul in her affidavit in fact refers to a conversation in Mrs Sandman's presence apparently where Vicky at least tells Ms Paul of that fact.

Next is item (h) and this is the 1st of September so we're getting near the end of the year. Again, Ms Paul wrote to the deceased but care of Vicky advising in effect Vicky of the indication of the rest home to terminate the occupation licence of the deceased due to her deteriorating mental health, and that letter of 1st of September is in the case on appeal because it was annexed to Ms Paul's affidavit. What wasn't annexed was the invoice bearing the same date for the attendances. That letter does refer to a telephone conversation on 31st of August 2010 and that may be relevant when one goes back to Ms Paul's affidavit about the inability of Mrs Sandman to conduct telephone conversations due to her hearing and the need to have anything like that going through a third party.

Then item (l), Vicky provides the first named first defendant with her own enduring power of attorney. So this is Vicky giving a power of attorney to Mr Giboney. That document is prepared, witnessed and certified by Ms Paul. So Ms Paul of the firm is aware that Vicky is so concerned about her deteriorating circumstances that Vicky herself can no longer look after her own affairs.

O'REGAN J:

It doesn't mean that at all. It's just making provision for when that happens.

MR DILLON:

These are the allegations in the statement of claim effectively, cumulatively working through to that point, Sir.

O'REGAN J:

Well, it doesn't say that Vicky wasn't capable of managing her own affairs and that's patently not the case. I mean the reason you sign an EPOA is because you are concerned that might occur in the future.

MR DILLON:

Yes, and she signs it on the 27th of September knowing that she's got the prognosis of imminent death and gives that to Mr Giboney, but the point is that Mrs Sandman signs her own one in favour of Vicky some two months later.

O'REGAN J:

So what?

MR DILLON:

Vicky's already passed on or made provision for the passing on of her own affairs because of her own imminent death. Two months passes and then Mrs Sandman provides an EPA in the first instance to Vicky and then substitution to Mr Giboney.

O'REGAN J:

With provision for it to be handed on to somebody else when it needs to be which is completely consistent with what Vicky did with her own affairs.

MR DILLON:

It does raise the issue of why you would provide Vicky in the first instance in those circumstances.

ELIAS CJ:

But what does it have to do with the knowledge of the firm as to the capacity or influence on Mrs Sandman?

MR DILLON:

In relation to this particular item it's clear that first of all by that stage Vicky is acting for Mrs Sandman because of the items identified prior to that and that Vicky's own circumstances are such that she is no longer to be able to look after her own affairs and is making a provision for somebody else to look after her own affairs, albeit somewhere in the future. But given that two months later Mrs Sandman makes a new EPA again in favour of Vicky in those circumstances and these are within the knowledge of the firm, that does seem a little bit peculiar.

ELIAS CJ:

But how is the knowledge material to the cause of action? How is the knowledge of that material to it?

MR DILLON:

It's submitted these things build on each other to –

ELIAS CJ:

Well, I don't know what's being built.

MR DILLON:

Well, perhaps I could move on to the next one because the construction is taking a bit more shape. On the 21st of October again Ms Paul writes nominally to the deceased care of Mr Giboney in this case but copied to Vicky setting out the terms of a proposed new will and the new enduring power of attorney in favour of Vicky and with Mr Giboney as a substitute, noting that giving the power to Vicky was to be reviewed in November. Now the will instruction letter notes that the first named first respondent will receive a bequest of 10,000 in consideration of his attendances as executor of the deceased's estate, so that's a new provision in the proposed will, and that the

firm will arrange for Dr Buckley to visit the deceased to provide the second defendants with a medical certificate confirming the deceased has capacity to make a will. So 21st of October Ms Paul is making the arrangements, notes first of all a provision to the benefit of the first respondent and also notes the need to obtain some evidence that Mrs Sandman actually has mental capacity to take these steps. But the important thing is that although this is meant to be a letter to Mrs Sandman it's in fact going to the first respondent and copied to Vicky. That does seem peculiar. If Mrs Sandman was in full control of her mental capacity at that point in time, why are these other parties all being involved in the will instructions?

GLAZEBROOK J:
It's relatively common, isn't it, when somebody's elderly that people are there to assist and often people want someone there to assist?

MR DILLON:
In this case –

GLAZEBROOK J:
Especially if there's difficulties with hearing and matters of that kind.

MR DILLON:
In this case it's clear that correspondence can go direct to Mrs Sandman and Mrs Sandman, if she is mentally capable, can seek whatever assistance Mrs Sandman requires when she receives the letters, but that's not what is happening in this case. There's a very consistent pattern alleged of reporting to third parties in relation to Mrs Sandman's affairs.

The next step is obtaining this medical certificate which has already been referred to. The difficulty with it is by the time it's relied on it's some three months out of date.

And then attending on Mrs Sandman to witness the execution of the will and the statutory declaration in relation to the changes to that will. That declaration is prepared by the firm and executed with the will.

And then finally item (q) is the report to in fact Vicky in relation to the will, the powers of attorney and an invoice for those services being issued. Again it is consistent with this not being Mrs Sandman's will in fact but a will prepared by Vicky.

In terms of the pleadings, we can then go to paragraph 12 because that is the pleading again of undue influence which my friend has referred to in his submissions and in that regard there are two items under paragraph 12, (c), 12(c) and 12(d). When pleading undue influence against Vicky and/or Mr Giboney (c) and (d) refer to the involvement of the solicitors in reporting to those two parties in relation to Mrs Sandman's affairs.

And then coming back to the principal pleading, having established those various particulars we have then paragraph 23, that the second defendant knowingly assisted Vicky and/or effectively Mr Giboney obtain control of the affairs of the deceased and the obtaining of control of the affairs of the deceased refers to such steps as certifying the EPO for the purposes of taking control of the bank accounts and then in the instructions in relation to the will and the new EPOs themselves and that then, in paragraph 24, that that has caused the first named defendant loss or damage.

Now they both refer specifically to knowing assistance and the requirements of knowing assistance involve dishonesty and we've addressed that affect earlier in the submissions.

So that takes the Court through the particular elements as they are pleaded. It's quite clear that the pleadings do not use the word "dishonestly". It does not say the firm dishonestly knowingly assisted. That's accepted. But on the other hand knowing assistance itself requires dishonesty and the particulars of that assistance are particularised. That is Mr Sandman's position.

My friend also took the Court to some of the particular evidence that has been put before the Court. One of the items he referred to was Mr Mellett's certificate where Mr Mellett certifies the enduring powers of attorney and in particular he certified that he doesn't have any reason to be aware of any impediment of Mrs Sandman when she enters into that document. However, there's a particular context to that certificate and that context arises from the case on appeal page 125 and at page 125 there is a letter from –

O'REGAN J:
Which volume are you in here?

MR DILLON:
This is the volume 3 exhibits, case on appeal page 125. It's not apparent at the heading. It looks like it's an office copy of a letter but you can see from the sign-off this is a letter from Ms Paul to Mr Mellett and it's her instructions to him in relation to him attending on Mrs Sandman for the purpose of executing these enduring powers of attorney. Of particular relevance is the second paragraph, the second sentence, "She does have mentally *[sic]* capacity and we enclose a copy of a certificate from her medical practitioner dated 28th October 2010 for your records." So Mr Mellett is being sent to see Mrs Sandman on instructions from Wilson McKay and those instructions specifically indicate to Mr Mellett that he doesn't have to worry about mental capacity. The firm is effectively certifying to him that she does have mental capacity and furthermore here's the medical certificate, which was by then three months out of date, to put your mind at rest, and then Mr Mellett signs, sees Mrs Sandman, signs that certificate, but that's the context.

It's submitted that Mr Mellett's certificate doesn't really take the Court very far in the context where there are, there's cogent evidence from third parties, albeit under the shroud of possible hearsay, that independent people could satisfy themselves that Mrs Sandman didn't have that type of capacity.

GLAZEBROOK J:

So you're suggesting that Mr Mellett, if he took the view that she had absolutely no mental capacity whatsoever, would actually sign something saying that he had no reason to think she didn't have mental capacity?

MR DILLON:

I think it's put rather this way, that it's something that he has to certify. He has to satisfy himself that there's no issue with mental incapacity but his instructions are already telling him, "You don't have a problem with this." That puts –

GLAZEBROOK J:

Well, he's still certifying himself specifically.

MR DILLON:

Yes.

GLAZEBROOK J:

And he's a solicitor certifying explicitly that he doesn't have any reason to say that. He would not be able to say, "Oh, that's because they told me that," would he?

MR DILLON:

No, that would certainly not be an excuse for –

GLAZEBROOK J:

In front of the Law Society if he was called up.

MR DILLON:

No, no, but to the extent that he's being misled, might be too strong a word but it might in fact be the word, not to make the inquiries that he might not otherwise or that he might otherwise have made to satisfy himself because of the terms of the instructions that he's given. It's almost a letter that says you don't have to worry about this. We don't have Mr Mellett's evidence about

what happened on the day but it's submitted that a certificate on its face isn't exactly reliable given the terms of the instructions that he received.

O'REGAN J:
If you were knowingly assisting someone to do something dishonest why would you get a third party lawyer to give the certificate?

MR DILLON:
I understand that because the firm has acted for Mrs Sandman that there has to be an independent solicitor certifying the matters that are set out in the statute. So it couldn't be Wilson McKay that could do that. It had to be another solicitor, an independent solicitor, and that's why Mr Mellett is wheeled in for the purposes of talking to Mrs Sandman, getting her to sign it and issuing a certificate. You can see from the terms of the letter that I've referred you to that it was just a, it's literally a one-off instruction.

My friend also drew your attention to the letter to Mr Mark Sandman dated the 5th of November which appears at page 121 on the case of appeal and that was a reply to Mr Mark Sandman because he had raised issues with Wilson McKay about what was happening in relation to the conduct of his mother's affairs, and my friend referred the Court to the comments in that letter about, at the foot of page 121, the mother providing financial support, weekly allowances, body corporate fees and so forth and how this has been a considerable detriment to her financial resources. Now there's two points to be made in relation to this letter and the first is that the letter itself indicates that Ms Paul and the firm through Ms Paul does seem to have an in depth understanding of Mrs Sandman's affairs. The very fact that these things are recorded in the letter indicates that they're aware of the extent to which Mrs Sandman has been supporting Mr Mark Sandman. The second point of very real significance is on page 123. It's a three-page letter and you'll see under Ms Paul's signature that this letter is sent to Vicky Sandman and it's submitted that, particularly in the context of a summary judgment application that we're dealing with here, that would indicate where the instructions came from in relation to this letter, where all that detail came from. One in the

normal course writing a letter like this might expect it to be sent to the client because it's about the client's affairs.

ELIAS CJ:
Well, as the letter says, Vicky is the attorney.

MR DILLON:
Yes.

ELIAS CJ:
So it's entirely understandable surely to copy the letter. I don't really – I'm losing the drift of this. I'm not sure what the submission you're making is in reliance on this.

MR DILLON:
This case really is about, in Mr Sandman's view, about Vicky controlling her mother's affairs in a way that allows Vicky to write her mother's will and the firm assisting Vicky to achieve that purpose in circumstances where it is apparent to both Vicky and the firm that this is a significant disadvantage to Mr Mark Sandman because, simply put, they can't do it. Mrs Sandman couldn't change her will because of incapacity and nobody can change it for her short of an order of the Court.

ELIAS CJ:
Well, it all comes down to the incapacity issue, doesn't it?

MR DILLON:
It does.

ELIAS CJ:
Yes, I'm just not sure what we take from the letter that helps.

MR DILLON:
If at this stage Vicky Sandman is giving the instructions then all that detail and information is information in the possession of Vicky Sandman regarding

Mrs Sandman's affairs and it's Vicky that's instructed Wilson McKay in relation to those details to respond to Mark Sandman's expressed concerns about how his mother's affairs are being conducted. That would indicate that the firm is aware of the position that Vicky has in relation to her mother's affairs which also means that the firm is aware when Mark Sandman's interests under the 2005 will are prejudiced.

ELIAS CJ:
But no one – you're not asserting that there's any duty owed to Mr Sandman.

MR DILLON:
In terms of the pleading, paragraph 24 simply pleads that these steps have caused him loss but in circumstances where the firm was aware of that, that those steps would cause him loss.

If I could perhaps break –

GLAZEBROOK J:
Well, if it was a perfectly valid will in 2010, they would have been aware that it caused Mr Sandman loss but there was no duty to Mr Sandman to do anything about it.

MR DILLON:
Yes, and that takes us to the particular facts of this case and ultimately it's submitted that this case will depend on its facts once the evidence can be tested, but there are three propositions that relate to each other. The first is that under the 2005 will, as everyone knew that Vicky was dying, that would mean that Mr Mark Sandman would get everything. So in the first instance under the existing valid will Mr Mark Sandman would get everything. The firm knew that because it had access to that will. Vicky knew that for the same reason.

The second proposition is, and this is the incapacity point, if Mrs Sandman is so incapacitated that she can't change her will then that 2005 will is the last

will. Now it's still a will but importantly nobody can change it because Mrs Sandman has lost the capacity to do so.

The third point is at or around that time Vicky and Mr Giboney are acting on Mrs Sandman's behalf and the firm knows all those three things. But it's submitted that the first two, that Mark will get everything and that Mrs Sandman cannot now change her will, creates an interest for Mr Sandman. Now that interest could be described as a trust but let's describe it as an interest to the benefit of Mr Mark Sandman.

O'REGAN J:
But Vicky hadn't died at this time.

MR DILLON:
No, but she's been told that she's going to and in fact she does.

O'REGAN J:
Well, the interest might arise when she died on your, if your hypothesis was right but when I asked you for authorities you couldn't produce any.

MR DILLON:
Not in relation to this specific fact situation. Believe me, Your Honour, I've been looking for them. But on this specific fact situation I can't find them.

O'REGAN J:
That just makes it worse, doesn't it? It just tells us you're making it up.

MR DILLON:
Well, not necessarily and that's why in the written submissions there's a reference to these other ways in which interests of a similar nature have been recognised. Now if we take the point that Mark's going to get everything and Mrs Sandman can't now change her will, that will sits there until Mrs Sandman dies. My friend made the comment that until Mrs Sandman dies there's no property rights. I think he made that point in relation to discussion around

standing. But, with respect, that must be incorrect because as an instance we have agreements for sale and purchase which, when they're unconditional, we have the purchaser as the equitable owner. That's always been recognised. It's not a novel position.

O'REGAN J:
If Mrs Sandman had died the day after this will, and in fact the will turned out not to be valid, the 2005 will would have come into effect and Vicky and Mr Sandman would have shared half each.

MR DILLON:
Yes.

O'REGAN J:
So how could he possibly have an interest in Vicky's half?

MR DILLON:
Mrs Sandman is making her will in a particular fact situation.

O'REGAN J:
Just answer the question. At the time the will was made the status quo under the 2005 will was sharing half each.

MR DILLON:
Yes.

O'REGAN J:
And so if she died the following day that's what would have happened.

MR DILLON:
Indeed.

O'REGAN J:
So how did Mr Sandman have an interest in Vicky's half?

MR DILLON:

Not until Vicky died.

O'REGAN J:

Well, that was months after all this happened.

MR DILLON:

It was something like three months later, yes. But that was known at the time that this particular will was entered into.

O'REGAN J:

Well, it was known that she was sick.

MR DILLON:

Well, she had a prognosis that said she would be dead within six months.

O'REGAN J:

Right.

MR DILLON:

Yes, and she was, yes. So –

O'REGAN J:

So are you saying if you're a beneficiary under a will and one of your siblings is sick, you get an interest in their share?

MR DILLON:

Well, it rather depends on what the will provides. It is an interest. It's not vested and it doesn't vest until the events that would give it from an equitable interest to a true property right would arise.

GLAZEBROOK J:

So it's certainly not an equitable interest because the residuary beneficiary doesn't have an equitable interest in the property of the estate which is just, just law.

MR DILLON:

In this particular instance though we're dealing with the will and given that the will can't be changed it's looking more like a trust than it would a will in the normal context where the next day the will can be changed.

GLAZEBROOK J:

Well, people actually go in and out of mental capacity as well, possibly not in the dementia but in many instances, especially with elderly people, if they're a bit ill they have no mental capacity, if they get over their flu or their bladder infection or whatever it may be they actually come back and have mental capacity.

MR DILLON:

Yes, and that's accepted. In fact –

GLAZEBROOK J:

So for all we know Mrs Sandman, even if she didn't have mental capacity when she – she could well have regained mental capacity later.

MR DILLON:

Yes, but I –

GLAZEBROOK J:

I mean the fact that she didn't and went downhill is a bit like – it was possibly more certain that Vicky was going to die than necessarily Mrs Sandman was going to deteriorate to the extent that she didn't have periods where she was perfectly lucid and perfectly able to make a will.

MR DILLON:

Yes, but –

GLAZEBROOK J:

But even Vicky dying isn't absolutely certain. People do have amazing remissions and for quite long periods.

MR DILLON:

Yes, that's accepted as well. But again in the facts of this case this particular document, which is the will that's under attack, is being created in circumstances where Vicky has been told that she's about to die, that the new will takes away from Mr Sandman what will happen if she does die under the 2005 will. Now again I haven't used the word "trust" but rather the word "interest" under the 2005 will but that interest is being attacked, well, that is, of course, Mr Sandman's position, that interest is being attacked by the steps that have been taken by Vicky and/or Mr Giboney in getting this December 2010 will executed by Mrs Sandman. Effectively, it's a situation where Mr Sandman is alleging against the firm that they're assisting Vicky and/or Mr Giboney from interfering unlawfully in the interest that he's got under the 2005 will.

GLAZEBROOK J:

What's the theory as to why they would be wanting to do that? You said it was to exclude Mr Sandman but if in fact Vicky left him money, which we were told was the case, I don't know whether there's anything in from her estate, I don't know whether there's anything in the record on that.

MR DILLON:

Yes, I'm not sure whether there is.

ARNOLD J:

Yes, there is, in one of the affidavits on the cost application, I think. I think she left $120,000.

MR DILLON:

All right.

ARNOLD J:

Just while I'm speaking, this theory that Vicky was trying to deprive Mr Sandman, your client, of something, why in those circumstances would

she effectively have thrown $200,000 into the pot because she didn't get the 200,000 under the 2010 will she would have got under the 2005?

MR DILLON:

The only explanation that can be proffered at this stage is that she understood that she was never going to take under that will anyway. She wasn't going to outlive it. Her interest was always going to disappear. The question is who got it in the end and Mr Sandman's case is that his sister didn't want him to receive her share. And there might be some support for that view when one considers the document I've just referred to at page 121 to 123 if we read that as Vicky's instructions to Wilson McKay and the reasons why Mr Mark Sandman shouldn't benefit any further.

In the context of the firm assisting Vicky and Mr Giboney interfering unlawfully in the interest of Mark Sandman in the 2005 will, that does reflect on the proposition that was put to counsel this morning as to whether Vicky and/or Mr Giboney owe any sorts of duties direct to Mark Sandman and in further consideration of that if the proposition that the firm has assisted unlawful interference in Mr Sandman's interest is correct, then equally it must mean that Vicky and Mr Giboney owe some limited duties to Mr Sandman but they're negative ones and that would be not to interfere with his rights under the 2005 will. It's outside –

GLAZEBROOK J:

Where does that arise from?

MR DILLON:

Well, it arises, the negative duty, really on the facts because –

GLAZEBROOK J:

No, no, I don't – I'm just –

MR DILLON:

Yes, that did happen.

GLAZEBROOK J:
I actually want the theory of it.

MR DILLON:
It does seem that if they are possessed of the power to achieve an unlawful object then they must owe duties to the people who would be disadvantaged if that unlawful object were achieved.

GLAZEBROOK J:
I can understand that just in respect of the powers of attorney but this wasn't in furtherance of the powers of attorney.

ELIAS CJ:
Or even under the powers of attorney.

GLAZEBROOK J:
Sorry, I suppose that's what I meant.

MR DILLON:
It wasn't under the powers of attorney in the sense that the will wasn't executed by Vicky purporting to exercise a power of attorney with a certificate that she was the attorney. Rather it was by virtue of Vicky's ability to instruct solicitors on behalf of her mother to take all the steps of an agent or attorney in relation to her mother's affairs which clearly she was doing and which the firm was aware that she was doing, witness again at page 123 where this report, this letter answering Mr Mark Sandman's queries is copied to Vicky. It's a recognition of those –

GLAZEBROOK J:
Well, she would have had the ability to deal with her mother's affairs in relation to requests for money under the power of attorney.

MR DILLON:
Indeed.

GLAZEBROOK J:
Of course she would.

MR DILLON:
Yes, that's right.

GLAZEBROOK J:
So that's irrelevant really, isn't it?

MR DILLON:
It's irrelevant –

GLAZEBROOK J:
Because she would – and she would be obliged in looking at requests for money to consider the needs of her mother and the money that her mother may need in order to look after herself.

MR DILLON:
Absolutely. That's accepted, but in the context of knowing assistance it's clear that the firm was aware that Vicky was conducting her mother's financial affairs which reinforces the incapacity issue. If Mrs Sandman isn't able to count her own beans and somebody is doing that on her behalf and the firm is aware of that then is Mrs Sandman able to dispose of her beans through her testamentary disposition?

GLAZEBROOK J:
I suppose my trouble was I thought we were – I thought this was to show a duty to Mr Sandman. I can understand the argument about incapacity that you're putting although actually that knowledge isn't actually pleaded but we can understand you're relying on that but I may have misunderstood what you were saying this letter proved. Was it only that they were aware that Mrs Sandman needed assistance?

MR DILLON:

Yes, and –

GLAZEBROOK J:

Okay, that's all right.

MR DILLON:

And the letter indicates that because it has got very detailed information about Mrs Sandman's affairs and it goes back –

GLAZEBROOK J:

All right, no, that's fine if that's all it was for.

MR DILLON:

Yes, yes. But this conversation arose out of the question of Vicky and Mr Giboney's duties, if any, to Mark.

ELIAS CJ:

Well, none have been alleged and it's way too late in reply to start enlarging upon those.

MR DILLON:

No, none have been – no, I wasn't intending to do anything other than address the question that had been raised this morning as to whether there might be some. My answer then was –

ELIAS CJ:

You gave that away so we've moved on from it.

MR DILLON:

Fair enough, thank you, Your Honour. My friend then referred to the affidavits by the third parties and referred to Mr Daniel's affidavit and Mr Gotleib's affidavit as having no relevance but the relevance of both those are instances of identifying Mr Giboney's control of Mrs Sandman's affairs when those individuals had reason to contact Mr Giboney about Mrs Sandman's affairs.

So again this is about the knowledge of this agency attorneyship type relationship which is the basis of the claim that the firm has knowingly assisted those agents.

GLAZEBROOK J:
And that's because they knowingly assisted when they knew she was incapacitated? That's the only relevance?

MR DILLON:
Yes.

GLAZEBROOK J:
Yes, thank you.

MR DILLON:
Yes, but it just shows that this was happening at the relevant time, which may not actually be a matter that's in contention between the parties.

My friend then referred in terms of his legal authorities to the *Vernon* case in relation to an attack on the power of attorney, whether the Court held that that is an action that only an executor can bring, but it's respectfully submitted that in fact there's a statutory standing that now applies in relation to those types of attacks which allow beneficiaries under the statute.

ELIAS CJ:
Which statute?

MR DILLON:
In fact Mr Sandman is a perfect example of that in the Family Court proceedings. He had standing to bring it, the proceeding under the statute.

ELIAS CJ:
Is that the Care and Protection legislation?

MR DILLON:

Yes. There's the list of people who have standing to attack the exercise of powers of attorney and the administration of those powers of attorney and Mr Sandman fits the…

O'REGAN J:

But he's attacking a will here, not a power of attorney.

MR DILLON:

It's just that this particular case my friend was relying on was a power of attorney case where the Court said that a person in Mr Sandman's position didn't have standing but I'm just alerting to the Court to the fact that that seems to have changed by the statute.

My friend also referred in a similar vein to the *Simpson v Walker* case which the appellants rely on and pointed out that it was the administrators of the estate to bring that type of claim but in this particular case the administrators of the estate are in fact the partners of the firm because all of the partners of the firm were named as executors together with Mr Giboney now which is a rather peculiar provision and in fact the partners of the firm appear to have delegated that to Mr McKay alone but that's not what the will says.

So that would mean that the people against, on that submission, the firm would have to be suing itself to assert the rights that Mr Sandman is attempting to assert which is not something that the Court would be willing to consider.

In relation to the *Knox v Till* case in my friend's bundle at page 201, the questions from this case really are who is the client and what are the client's instructions. This goes to the heart of the incapacity argument. If Mrs Sandman is incapacitated then those instructions couldn't have been her instructions, yet she is nominally the client but the instructions are coming from a third party, and the question was asked perhaps rhetorically in the *Knox v Till* case about what steps solicitors in these circumstances could

practically take. The answer to that question was addressed in the *Nijsse v Squires* case about the inquiries to be made at the time of execution of the will, general questions just to test the capacity of the testatrix at that time, that she does know what is going on and can give proper instructions and can validly sign the will.

GLAZEBROOK J:
So you're suggesting that solicitors conduct a medical examination and then they can take a view on capacity when they don't have medical knowledge?

MR DILLON:
It's submitted that where the facts are such that it is an issue, it's an issue that is completely outside the professional competence of solicitors and it's rather like a, for instance, an issue valuation which might arise. Now a solicitor might proffer a view but he would be wrong and in breach of his duties to advise his client to proceed on the basis of the solicitor's view of valuation.

GLAZEBROOK J:
All right, so what does the solicitor do in this case then? The solicitor can't assess it him or herself you accept, so what does he or she do?

MR DILLON:
Well, in the facts of this case there was a question mark about incapacity and the solicitor took the precaution of seeking a medical certificate which was at the time that it was relied on three months out of date.

GLAZEBROOK J:
Let's have a look at it in general.

MR DILLON:
Yes.

GLAZEBROOK J:

So you go and see a client. The client says, "I want a will made." You're concerned about mental capacity but you're not as a solicitor able to assess that. What do you do or what are you obliged to do?

MR DILLON:

It's submitted that first of all you take a very careful note of the instructions you received and the reasons that you have some concerns and then seek medical advice in relation to those concerns.

GLAZEBROOK J:

Well, and the client says, "I'm not seeing any doctor. I'm perfectly capable of doing this and I want and I instruct you to do it."

MR DILLON:

Again it would be a matter of having a very careful record of those instructions so that those instructions could be fulfilled. But the note would have to record the reasons why there are question marks around that so that it can be looked at subsequently.

GLAZEBROOK J:

But you're recording your views of capacity when your client says, "I am fully capable and I want you to do this," so you're going against your client's instructions by saying he says or she says she's perfectly capable but I don't think they are.

MR DILLON:

Yes, but presumably one would ask a few questions such as who was the prime minister and what is the date just so that they could be recorded.

GLAZEBROOK J:

Well, frankly, if you asked that in Australia you might be – you might have difficulty getting a number of people able to say so.

MR DILLON:

Yes, it was a day starting with T so it must have been a prime minister starting with T. Yes, appropriate questions can be phrased and the importance of the *Nijsse v Squires* case is that it was in 2004. It pre-dates these events and sets out some indication of a practical test that solicitors in those circumstances could take, and there is no suggestion here that anything like that was done notwithstanding the fact that there is evidence here that there was a question of incapacity which the medical certificate was an attempt to address.

ARNOLD J:

So when you say there was a question, there was no question in the mind of the lawyers but there was a question that your client had raised in his letter. Is that what you're talking about?

MR DILLON:

No. With respect, Sir, it is inconsistent to say there's no question in the mind of a lawyer when the lawyer records the fact that they, to make sure there is no question, are seeking a medical certificate. That would indicate there is a question and that's why the medical certificate was sought. If there was no question, why would you seek a medical certificate?

ARNOLD J:

Well, the explanation, I mean there's no point going into all of this, but the explanation in the letter was that it really related to Mark's position and the attitude that he was expressing. That was the reason it was thought a wise step. Anyway that's –

GLAZEBROOK J:

But it can be wise in any event if somebody is elderly and has not been very well to say, well, just to stop arguments later we'll get a contemporaneous medical certificate.

MR DILLON:

And that's accepted and perhaps the key word there is "contemporaneous".

GLAZEBROOK J:

Well, no, I understand that but it doesn't mean that they thought she wasn't capable the fact that they thought it was prudent to get a medical certificate. It would be prudent in many circumstances, not perhaps for a 20 year old who showed no signs of anything but anybody who's elderly it would perhaps be prudent to do so.

MR DILLON:

Indeed, and with Mrs Sandman's particular medical history in this particular case, and there's some indication of the knowledge of the firm in relation to that, it was indeed a prudent step. The difficult was that the step was not carried out as well as one would have expected it to be carried out in those circumstances. The questions that could have been asked don't appear to have been asked.

GLAZEBROOK J:

Well, that may found a negligence claim but why does it show dishonesty?

MR DILLON:

Well, if Mr Sandman's contentions are correct it was a part of a course of conduct leading to a required result, namely the execution of this new will. So the steps were taken there as cover so that that object could be achieved. That would be his contention. It's just that they weren't taken at the appropriate time, consistent with his contention.

Those are my submissions in reply. I've tried to keep them strictly in reply. Does the Court have any further questions?

ELIAS CJ:

No, thank you, Mr Dillon. All right, thank you, counsel. We will reserve our decision.

COURT ADJOURNS: 3.18 PM