IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 35/2018
[2019] NZSC 41

BETWEEN	MARK ROBERT SANDMAN Appellant
AND	COLIN CHARLES McKAY, ROGER DAVID CANN AND DAVID JOHN CLARK (as partners of Wilson McKay) Respondents

Hearing:	12 November 2018
Court:	Elias CJ, Glazebrook, O'Regan, Ellen France and Arnold JJ
Counsel:	R M Dillon for Appellant P J L Hunt and J Heard for Respondents
Judgment:	16 April 2019

JUDGMENT OF THE COURT

A The appeal is dismissed.

B Costs of $25,000 plus usual disbursements are awarded to the respondents.

REASONS

	Para No.
Glazebrook, O'Regan, Ellen France and Arnold JJ	[1]
Elias CJ	[104]

GLAZEBROOK, O'REGAN, ELLEN FRANCE AND ARNOLD JJ
(Given by Glazebrook J)

TABLE OF CONTENTS

	Para No.
Introduction	[1]
Background	[3]
The proceedings	[35]
Statement of claim	[42]
Court of Appeal decision	[46]
Mr Sandman's submissions	[57]
The firm's submissions	[63]
Evidence	[69]
Summary judgment	[71]
Strike-out	[98]
Result and costs	[102]

Introduction

[1] The appellant, Mr Mark Sandman, is the only surviving child of Elizabeth Nancy Sandman, who died on 30 October 2013. Mrs Sandman's other child, Victoria Sandman (Vicky), died in March 2011.

[2] This appeal concerns whether the Court of Appeal was correct to make an order for summary judgment in favour of the respondent firm, Wilson McKay (the firm).[1] The claim by Mr Sandman is that the firm knowingly assisted in a breach of trust and/or fiduciary duty by Vicky and Mr Giboney. Mr Giboney was one of Mrs Sandman's executors and trustees under a will executed on 2 December 2010 (the 2010 will).

Background

[3] Under the 2010 will the apartment Mr Sandman occupied was bequeathed to him and there were also a number of minor bequests. The residuary estate was to be divided equally between Mr Sandman and Vicky. In the event either of her children predeceased her, that child's share of the residuary estate was to be divided in specified

---

1 *McKay v Sandman* [2018] NZCA 103, [2018] NZAR 707 (Brown, Brewer and Collins JJ) [CA judgment].

percentages among various relatives and friends[2] and would not go to the surviving child.

[4] Under an earlier will executed in 2005 (the 2005 will), Mr Sandman was bequeathed the apartment and Vicky was left $200,000. Vicky was also bequeathed some specific items, such as jewellery and art. The residuary estate was to be divided equally between Mr Sandman and Vicky. If one of her children predeceased her, the whole residuary estate would (absent grandchildren)[3] go to the surviving child.

[5] After Mrs Sandman's death, the firm obtained probate of the 2010 will and acted in the administration of the estate. Mr Sandman had lodged a caveat against the grant of probate just after Mrs Sandman' death. This had been withdrawn after he was sent a copy of the will in early November. Mr Sandman confirmed in writing on 13 November 2013 that he was "happy with the will".

[6] On 10 December 2013 Mr Sandman consented in writing to the distribution of the estate within six months of the grant of probate and he also indemnified the executors for any loss arising from the early distribution.[4] Mr Sandman's share of the residuary estate amounted to approximately $440,000.[5] Final distribution of the estate was made by the end of 2014.

[7] The firm had acted as Mrs Sandman's solicitors from 2007. At that time she sold her home and moved to a retirement village (the Village). As required before Mrs Sandman entered the Village, she executed two enduring powers of attorney in favour of Vicky. The one relating to property became immediately operable. The one relating to personal care and welfare became operable only when Mrs Sandman became mentally incapable.

[8] Mrs Sandman met with Ms Paul, a solicitor from the firm, on 3 February 2010. Ms Paul's letter of 4 February 2010 records that Mrs Sandman was considering

---

2 These included nieces and nephews, Mrs Sandman's sister and Mrs Giboney. Under the 2010 will, Mr Giboney was left $10,000 in consideration of his assistance to Mrs Sandman and for work undertaken as her trustee.

3 There were no grandchildren.

4 We understand that the other beneficiaries had signed a similar form.

5 *Sandman v Giboney* [2017] NZHC 1832 (Associate Judge Christiansen) [HC judgment] at [13].

changing the 2005 will but had decided to leave it in place for the meantime. The letter records that Mrs Sandman had been concerned that the 2005 will was not fair to Vicky in light of the continuing support provided to Mr Sandman. As the letter notes, Vicky did not wish Mrs Sandman to change her will and Mrs Sandman decided not to do so at that stage:

> We note you are concerned that due to the fact you have been and will continue to support Mark, who is unemployed that Vicki is disadvantaged by your Will. As you are aware, Vicki at your request was present at this meeting [and] she did not want you to alter your Will in her favour based on current circumstances. We note that you have been experiencing medical problems and have attended a number of Doctors and ongoing investigations and tests are being carried out. As you have a valid Will that is acceptable in the circumstances, particularly to your daughter Vicki, until your health issues are identified and resolved you will not alter your existing Will.

[9] On 4 February 2010 Mrs Sandman was referred to Auckland hospital by her general practitioner, Dr Jane Buckley, for anxiety and depression. Dr Buckley said Mrs Sandman was now very dependent on Vicky but was still living independently. It was noted that Mrs Sandman was becoming increasingly reclusive and had become more confused when on holiday with Vicky (apparently in December 2009). Dr Buckley said that Mrs Sandman had become increasingly forgetful and fearful. On 19 March 2010, a consultant psychiatrist reported that there were no immediate safety concerns but there was "mild cognitive impairment".

[10] In July 2010 Mrs Sandman had a fall and broke her femur. Consent to the resulting operation was given by Vicky on Mrs Sandman's behalf, due to, as stated in medical notes, Mrs Sandman's "mild dementia". After the operation Mrs Sandman suffered from post-operative delirium which was slow to resolve.[6]

[11] On her return to the Village, Mrs Sandman was placed in the hospital wing of the Village to recuperate. Mrs Sandman, however, wished to return to her unit. According to Ms Paul's affidavit filed in these proceedings, she provided advice to Vicky about Mrs Sandman's rights in this regard in a telephone call on 31 August 2010, followed up by a letter on 1 September 2010 recording her advice.

---

6 This may have been related to the pain medication.

[12] A gerontology nurse specialist, Ann Pidgeon, was instructed by the Village doctor to assess whether a return to independent living was possible. Her report of 21 September said that Mrs Sandman's "MMSE today [16 September] was 19/30; losing points in orientation, short term recall, and copying of design."[7] It was said that Mrs Sandman had become "institutionalised" and would need time "to adjust to some self reliance". It was said further:

> Mrs Sandman mobilises with a stroller frame, she needs encouragement to walk more. … I would recommend that she is supervised when walking in the [V]illage and we have discussed this added risk of falling when alone in her apartment. A St John's medical alarm may also be warranted.
>
> Mrs Sandman will require ongoing supervision with showering and medication management, breakfast set up and exercise times. This will be provided by RDNS [Royal District Nursing Society] who will visit twice daily. … Leigh [Giboney] will organise a privately paid person called Lisa to visit 10.30 to 1.30 each day; she will assist with shopping, outings, home help and lunch.
>
> Leigh will organise a visit to her previous GP Dr Buckley once she is in her own apartment.

[13] Mrs Sandman was cleared to trial a return to her unit and independent living arrangements from the end of September 2011. Ms Paul in her affidavit deposed that her understanding was that the Village's concerns were only in relation to Mrs Sandman's physical health. She considered that, if the Village had had concerns about Mrs Sandman's mental health, she would not have been allowed to return to her unit.[8]

[14] On 19 October 2010 Ms Paul met with Mrs Sandman to take instructions for a new will. In the course of that meeting Vicky disclosed that she had been diagnosed with terminal cancer. Ms Paul deposed that, apart from naming a few chattels that she wanted and suggesting that the Auckland Cup be given to the Auckland Racing Club, Vicky's only influence during the meeting was telling Mrs Sandman she did not want to be compensated for Mr Sandman being left the apartment.

---

7 MMSE (Mini-Mental State Exam) is a preliminary and contextual neurological screening test carried out by health professionals: see Virginia B Kalish and Brian Lerner "Mini-Mental State Examination for the Detection of Dementia in Older Patients" (2016) 94 American Family Physician 880.

8 Ms Paul does not say whether or not she was aware of the report by Ms Pidgeon. We consider it unlikely that Ms Paul saw a copy of the report given it was a private medical record.

[15] On 21 October 2010 Ms Paul wrote to Mrs Sandman setting out the instructions received. The letter was sent care of Mr Giboney at Mrs Sandman's request.[9] The letter recorded a change of executors and trustees: from the New Zealand Guardian Trust Company[10] to Mr Giboney and Mr McKay, one of the partners of the firm. It then said:

> Personal effects. You will make a list of all furniture, household goods and personal chattels that you want to leave to specific individuals ie Mark, friends and family members with a description sufficient for identification in due course. The balance of your assets will be sold and the funds form part of your residue and those assets that have no economic value, your Executors will dispose of them as they see fit ie donate to a charity. Please sign and date that list and forward to our office and retain a duplicate with your papers.

[16] The letter went on to record that the apartment and related chattels were to go to Mr Sandman and that there was to be a legacy of $10,000 to Mr Giboney for his work as executor. As to the residue of the estate, it was said:

> The balance of the estate will be transferred to the Trustees upon trust to pay all estate expenses and fifty per cent of the balance will go to Mark and 50% to Victoria, provided however in the event either Mark or Victoria predecease you then their share will be divided between your sister Christine, two nephews and one niece. In the event your sister has predeceased you, her share would go to her children.

[17] In the same letter Ms Paul said that Mrs Sandman may wish to consider whether she wished to add other beneficiaries in the unlikely event that both Vicky and Mr Sandman predeceased her. She also asked for a decision as to the percentages to be distributed to the sister, nieces and nephews. The letter also dealt with the need for replacement powers of attorney to deal with Vicky's illness.

[18] Ms Paul also said in her letter that she would arrange for Mrs Sandman's doctor to certify capacity to make a will. Ms Paul indicated this was prudent even though Ms Paul was satisfied as to Mrs Sandman's capacity. She said:

> Prior to signature of your Will we will arrange for your Doctor, Dr Jane Buckley to visit you to provide us with a medical certificate confirming that she is satisfied that you have the capacity to make a Will. Please note the writer is satisfied that you do have capacity, however in the circumstances we feel it is prudent to ensure that we have a medical certificate on file.

---

9 According to Ms Paul's affidavit, this was because Mrs Sandman was concerned Mr Sandman might see the draft will if it was sent to her directly.

10 The New Zealand Guardian Trust Company was the executor of the 2005 will.

[19] Ms Paul wrote to Dr Buckley on 27 October 2010 saying that Mrs Sandman was making a will and granting a power of attorney, and requested a medical certificate as to Mrs Sandman's capacity. Ms Paul wrote:

> The writer is satisfied that Mrs Sandman has capacity but in the circumstances it is prudent to obtain a certificate from you. Can you please confirm that you would be able to do so, we will then scan you through the [form] of certificate and then contact Mrs Sandman to arrange for her to see you.

[20] The medical certificate was sent by Dr Buckley on 28 October 2010. It said:

> Thank you for your letter requesting a certificate regarding the mental state of this lady. She was seen by me on 30/9/10, and has been my patient for 8 years. In my opinion she does have the mental capacity to understand that she is making a will & disposing of her assets & does have the understanding about granting a power of Attorney.

[21] Around this time the firm received a number of letters from Mr Sandman. Ms Paul was aware that Mr Sandman had contacted Mr Giboney seeking funds for medical treatment, including a letter to Mr Giboney on 29 October 2010. On 31 October 2010 Mr Sandman wrote to Ms Paul complaining that he was being excluded from Mrs Sandman's affairs. Amongst other things he said:

> I hope you are aware by now that my mother has dementia. This I have seen oncoming for a number of years and partly explains her behavior towards me. That being, treating me like I am not part of the family and am incompetent. An example of this behavior was a few weeks ago when I was visiting her. She wouldn't allow me to phone reception and enquire as to why her evening meal had not been delivered. She said I wasn't capable of making the phone call and her friend Les Trusscott had to make the call. This is typical of what I have to put up with in my relationship with my mother but it is all part and parcel of her dementia. Another example was she said in her will, she was leaving Vicky her share of the estate to her, but my share was to go to the Guardian Trust. She said I was too incompetent to look after my financial affairs. Because of her dementia, she is unaware I have Accountancy qualifications, have worked for two of the largest Chartered accountancy firms in NZ, was assistant accountant for Rothmans NZ, have worked for one of the largest stockbroking firms in NZ. And also in the early 20s built up from scratch a multimillion dollar business. She is also in denial I have been a full time artist for the last 20 years.

[22] On 5 November 2010 Ms Paul wrote to Mr Sandman enclosing with Mrs Sandman's permission the medical certificate. Referring to Mr Sandman's

31 October letter to her and Mr Sandman's 29 October letter to Mr Giboney, Ms Paul said:

> We note your statement that "my mother has dementia" in your letter. Please note that while your mother has aged related health issues, your mother does not suffer from dementia or any other condition that affects her mental capacity to understand and manager [sic] her affairs. In view of your belief that your mother has dementia in your recent correspondence and in previous verbal claims, we have taken the precaution of obtaining a medical certificate from your mothers [sic] doctor, Doctor Jane Buckley.
>
> Your mother has authorised the writer to forward you the certificate from Doctor Jane Buckley dated 28 October 2010 in which she states "she does have the mental capacity to understand that she is making a Will and disposing of her assets and does have the understanding about granting a Power of Attorney".
>
> In the circumstances the writer is satisfied that your mother is both entitled to and has the capacity to manage her own affairs. This includes appointing whom she wishes as executor of her estate and as her attorney.
>
> We would stress your mother is aware of her obligations to you as her son to make provision in her Will, this obligation however does not extend to having to provide you with financial support during her lifetime. You are of an age where your mother has no obligation to financially support you (or your sister Vicky) and if you are unable to support yourself financially you should apply for assistance to Work and Income.
>
> We understand however that your mother has been and continues to provide financial support to you, including making a weekly allowance of $300.00, paying all Body Corporate fees, Local Authority rates, telephone and electricity (paid by Vicky) for the apartment owned by her that you live in at no cost to you. We understand she has also provided you with significant other support over the years towards living expenses including paying for art materials, medical and dental costs. … This has been at considerable detriment to her financial resources.
>
> …
>
> We note in your letter to Mr Giboney that you refer to your mother as "a wealthy woman". The writer is aware of her financial resources and we wish to disabuse you of the notion that your mother is a wealthy woman. While your mothers [sic] assets are sufficient to provide for her current care and to continue to provide basic support for you, (at least in the short term) they are not sufficient for expensive private medical treatment where the public health system would provide you with adequate treatment.
>
> …
>
> In summary, your mother has both the capacity and the legal right to choose who she wants to assist her with financial and other affairs … .

[23] Further instructions on outstanding matters were received (conveyed through Mr Giboney as Mrs Sandman found telephone conversations difficult because of hearing difficulties). The draft will was then sent to Mrs Sandman on 15 November 2010 addressed to the Village. The letter dealt with various specific bequests of chattels and a general distribution clause related to chattels. It then said:

> Otherwise you continue to leave the Knightsbridge Apartment to Mark together with fifty per cent of your net estate (after payment of debts, funeral expenses etc) and the other fifty per cent to Vicky. In the event either Mark or Vicky predecease you then the share they would have received then is distribute [sic] amongst friends and relatives as discussed at our meeting. However you will note there is still ten per cent unallocated and you were to make a decision whether you wished to allocate this to one or two friends or relatives, if not then we would simply add that ten per cent back into the shares the existing beneficiaries would receive so that they receive a slightly bigger share than currently shown. Alternatively you could allocate it only to one or more of them. Please consider this issue and advise the writer and we can then finalise your Will for signature.

[24] Ms Paul's affidavit records that, once all the details were finalised, she attended on Mrs Sandman on 2 December 2010 for her to execute the new powers of attorney and the will. The new enduring powers of attorney were still in favour of Vicky but provided that Mr and Mrs Giboney would be successor attorneys (for property and welfare respectively). These were to be witnessed by an independent solicitor, Mr Mellett.

[25] Mr Mellett had been told by Ms Paul by letter the previous day that Mrs Sandman had some sight and hearing issues and "therefore she may need some guidance from you as to the position for signing the enclosed forms". It was stated that Mrs Sandman did have mental capacity. Ms Paul provided Mr Mellett with the 28 October 2010 medical certificate.

[26] Mr Mellett was left alone with Mrs Sandman so she could be given independent advice on the powers of attorney. After this, Ms Paul, together with Vicky and Mr Giboney, returned to execute the powers of attorney.[11] As witness to Mrs Sandman's signature, Mr Mellett certified that he had "no reason to suspect that

---

[11] The welfare power of attorney was executed by Mrs Giboney later that day.

[Mrs Sandman] was or may have been mentally incapable at the time she signed the enduring power of attorney" forms.[12]

[27] Mr Giboney then left and Ms Paul read the draft will and asked Mrs Sandman to confirm the will was correct. It was then executed by Mrs Sandman, and witnessed by Ms Paul and Mrs Sandman's caregiver.

[28] Ms Paul also witnessed a statutory declaration.[13] That declaration explained that Mrs Sandman had been advised that Mr Sandman may consider bringing an action under the Family Protection Act 1955. Mrs Sandman declared that in making the 2010 will she had taken into account the extensive financial support she had provided to Mr Sandman, including rent-free accommodation for the last 20 years and earlier financial support from her and her late husband (which had not been provided to Vicky). She asked that "my family respect my wishes and abide by the terms of my Will".

[29] Ms Paul deposed that she received a call in mid-2011 from one of Mrs Sandman's carers because Mrs Sandman wanted to discuss her will following Vicky's death. Ms Paul said she visited Mrs Sandman in November 2011 with copies of the 2010 will and the powers of attorney. After consultation Mrs Sandman advised that she did not wish to change her will. Ms Paul deposed that Mrs Sandman "appeared to have a good understanding of her will and how her estate would be distributed".

[30] Ms Paul wrote to Mr Giboney, who was now Mrs Sandman's property attorney, on 1 December 2011 setting out some matters Mrs Sandman had brought up at the November meeting:

> [Mrs Sandman] raised a number of issues at that meeting and has requested that we contact you in relation to one of these issues.
>
> [Mrs Sandman] wishes to reassure you that she is entirely satisfied with your handling of her financial affairs and it is clear from [her] condition that her affairs are being handled well. The writer was very pleased to see that

---

12 This requirement for certification is expressly prescribed in s 94A(7)(b) of the Protection of Personal and Property Rights Act 1988.

13 The separate statutory declaration was on the advice of Ms Paul who considered these issues were better dealt with in a declaration rather than in the will itself.

> [Mrs Sandman] now has [a] hearing aid which makes communication with her much easier and we are sure also makes life more pleasant for her, she being able to communicate and hear conversations with friends and her carers more clearly.
>
> [Mrs Sandman] wishes to have some involvement in her financial affairs and she has requested that on a monthly (or similar basis), you copy her in on her latest bank statement and a summary of investments (when they change only).
>
> The writer did assure [Mrs Sandman] that she had sufficient funds to maintain her lifestyle and her investments were managed conservatively to ensure her lifestyle could be maintained. [Mrs Sandman] appreciates that she is not in a position to actually manage her affairs, she simply wishes to have a regular update on her financial affairs.

[31] In relation to the will Ms Paul wrote:

> The other issue discussed was her Will. We reassured [Mrs Sandman] that her Will had been prepared in the knowledge that Vicky may not survive her and was still appropriate following Vicky's death. [She] also raised the issue of disposing of her chattels and jewellery on her death. We reminded her that a few items had been specifically allocated in her Will, however, the bulk were left such that the executors would distribute them in accordance with any wishes she made known to them. [Mrs Sandman] indicated that she would like to leave a list nominating various people to inherit her jewellery (namely nieces on her side of the family) and some of the other assets of sentimental or family value. For example the family medals which she will give to Mark on her death. [Mrs Sandman's] carer, Lisa advised that she would ensure that any list drawn up by [Mrs Sandman] would be posted to us to place with her Will and appropriately dated so that if [she] changed her mind subsequently, the latest list would apply. We advised [Mrs Sandman] that this should only include items of significance, the balance of personal items would be sold and form part of her estate. [She] was happy with this idea and we will advise when we receive a list.
>
> We also reassured her that Mark was looked after in her Will and would inherit the apartment he currently lives in, plus half her net estate, the balance being distributed amongst friends and relatives from her family and her late husband's family. The writer again reassured [Mrs Sandman] that she had sufficient investments to maintain her lifestyle, you are most probably aware that this appears to pray on [her] mind.
>
> In summary considering [Mrs Sandman's] recent bereavement she seemed in reasonable spirits and was clearly being well cared for. Mentally she seemed a lot more alert than previously, however this may be down to her hearing aid. She was aware of Mark's current activities and we understand he is visiting her semi regularly.

[32] In mid-2012 Mr Giboney informed Ms Paul that the Village wished Mrs Sandman to have longer care hours if she was to be allowed to stay in her unit. Ms Paul suggested she should be assessed by her doctor.

[33] Dr Buckley certified on 10 August 2012 that, due to advanced dementia, Mrs Sandman was no longer mentally capable of managing her affairs in relation to property. Nor was she capable of making decisions about her personal care and welfare.[14] Mrs Sandman was moved to permanent hospital care in November 2012 and remained there until shortly before her death.

[34] It is worth mentioning that Vicky's will bequeathed Mr Sandman 10 per cent of her residuary estate, which at the time of Vicky's death in March 2011 Mr Sandman estimated to be approximately $120,000.

The proceedings

[35] In November 2016 Mr Sandman filed proceedings seeking (as against the executors of the estate, Mr Giboney and Mr McKay) recall of the probate of the 2010 will and grant of probate of the 2005 will. The first two causes of action in the statement of claim are lack of testamentary capacity, and that Mrs Sandman did not have knowledge of the contents and effect of the 2010 will and did not approve the dispositions made under it.

[36] The third cause of action alleges undue influence by Vicky and/or Mr Giboney. As we understand the position, the allegation of undue influence is tied to Mrs Sandman's alleged lack of mental capacity in the sense that, due to this incapacity, it is alleged the 2010 will reflected the wishes of Vicky (and presumably Mr Giboney) and not those of Mrs Sandman.

[37] The cause of action in the statement of claim against the firm is dishonest assistance and damages are sought based on a comparison between the benefits that Mr Sandman would have received under the 2005 will and what he did receive under the 2010 will. Mr Dillon, counsel for Mr Sandman, confirmed at the hearing in this

---

[14] This state was said to be permanent and that it was unlikely Mrs Sandman would regain mental capacity.

Court that Mr Sandman makes no direct claim against the firm in negligence or otherwise.[15] The claim is for secondary or accessory liability only.[16]

[38] On 22 March 2017 the firm applied to strike out the claim against it, as well as applying for summary judgment and security for costs. On 4 August 2017, Associate Judge Christiansen in the High Court dismissed the applications for strike out and summary judgment. Security for costs was set at $40,000.[17]

[39] On 20 April 2018 the Court of Appeal allowed the firm's appeal and made an order for summary judgment on Mr Sandman's claim against the firm.[18]

[40] On 7 August 2018 this Court granted Mr Sandman's application for leave to appeal on the issue of whether the Court of Appeal erred in granting summary judgment to the firm.[19]

[41] On 20 August 2018 the firm filed a notice that it would support the Court of Appeal judgment on other grounds, including that the claim should have been struck out.

Statement of claim

[42] The statement of claim with regard to dishonest assistance says that, between March 2007 and December 2010, the firm "acted in relation to the deceased as set forth in paragraph 5 hereof, and with specific involvement and actual knowledge particularised in sub-paragraphs (a), (b), (g), (h), (l), (m), (n), (o), and (q)". Paragraph 5 of the statement of claim provides (in relevant part):

---

15 Any such claim would have faced formidable obstacles. Some of the difficulties are discussed in *Public Trustee v Till* [2001] 2 NZLR 508 (HC) at [25]–[29]; and *Knox v Till* [1999] 2 NZLR 753 (CA) at [2]–[6]. Because Mr Sandman's claim is not a direct one, however, we do not need to make any definitive comments on the applicability of these cases or the extent to which they correctly state the law about solicitors' duties.

16 We do not consider a claim by Mr Sandman on behalf of Mrs Sandman was available on the pleadings. In this respect, we differ from the view expressed by the Chief Justice at [122]–[123] of her reasons. In our view, Mr Sandman's sole claim against the firm in the pleadings was in dishonest assistance. As this is the case, we do not need to comment on whether Mr Sandman could have brought a claim on behalf of Mrs Sandman or on whether or not it would have supported Mr Sandman's claim for damages: see at [125] of the Chief Justice's reasons.

17 HC judgment, above n 5, at [112].

18 CA judgment, above n 1, at [94].

19 *Sandman v McKay* [2018] NZSC 71.

5. The 2010 will was executed by the deceased when she lacked testamentary capacity. The lack of capacity is evidenced by:

(a) On the 18th March 2007 the deceased granted Vicky an enduring power of attorney, that was not limited to when she may become incapacitated ("the 2007 EPOA").

(b) On 21 January 2010 Julie Paul, a senior associate of the Second Defendants [the firm], certified a true copy of the 2007 EPOA. The certified true copy of the 2007 EPOA was then presented to the ASB Bank Ltd to enable Vicky to take control of the accounts of the deceased from January 2010.

…

(g) In August 2010 Vicky was diagnosed as suffering a brain tumour and advised she had approximately 6 months left to live.

(h) On 1 September 2010 the Second Defendants through their employee Julie Paul (nominally) wrote to the deceased care of Vicky advising (in effect) Vicky of the indication by [the Village] to terminate the occupation licence of the deceased due to her deteriorated mental health. The letter of 1 September refers to a telephone conversation on 31 August 2010. On the same date an invoice (bearing date 31 August) was rendered nominally to the deceased but again care of Vicky, for that advice.

…

(l) On 27 September 2010 Vicky provided the first named First Defendant [Mr Giboney] with her own Enduring Power of Attorney (Vicky's EPOA"). Vicky's EPOA was prepared by, witnessed, and certified by Julie Paul.

(m) On 21 October 2010 the Second Defendants by their employee Julie Paul wrote (nominally) to the deceased, care of the first named First Defendant, and copied to Vicky, setting out the terms of a proposed new will, and of a new Enduring Power of Attorney (in favour of Vicky but with the first named First Defendant as substitutionary Attorney), noting that giving the power to Vicky was to be reviewed in November ("the will instructions letter"). The will instructions letter notes: (a) 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, and (b) that the Second Defendants 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.

(n) Contrary to the will instructions letter, the Second Defendants obtained a certificate from Dr Buckley dated 28 October 2010, recording that when Dr Buckley last saw the deceased on 30 September 2010, it was the opinion of Dr Buckley that the deceased on that date (30 September 2010) had capacity to execute a will.

(o) On 2 December 2010 Julie Paul attended on the deceased, and witnessed the deceased execution of the 2010 will. She also witnessed a statutory declaration by the deceased of the reasons for her changes in the 2010 will. The statutory declaration was prepared in advance by the Second Defendants and executed together with the 2010 will.

…

> (q) On 3 December the Second Defendant wrote (nominally) to the deceased but sent care of Vicky, copies of the 2010 will and the new Enduring Power of Attorney. An invoice for those services was issued same day, but addressed to the residential address of the deceased.

[43] The statement of claim also alleges that the firm acted for Mrs Sandman as well as Vicky at all "material times". It is asserted that sending various letters relating to Mrs Sandman's personal affairs to Vicky, including Mrs Sandman's will instructions, was a breach of the duty of confidentiality owed to Mrs Sandman.

[44] It is also alleged that, contrary to the will instructions letter, the firm did not obtain medical evidence of the testamentary capacity of the late Mrs Sandman as at the time of execution of the will.

[45] It is further alleged that:

> 23. Throughout 2010 [the firm] knowingly assisted Vicky and/or [Mr Giboney] [to] obtain control of the affairs of the deceased, and in particular the execution of a will that significantly reduced the benefits otherwise flowing to the Plaintiff, and effected Vicky's own intentions regarding the disposition of the estate of the deceased.
>
> 24. The actions of the Second Defendant in knowingly assisting Vicky and/or the first named First Defendant has caused loss or damage to the Plaintiff, being the difference in disposition to the Plaintiff under the 2005 will (which by Vicky's prior death would have been all of the estate), as opposed to the 2010 will (less than half of the estate).

Court of Appeal decision

[46] The Court of Appeal said that the cause of action for dishonest assistance has four components:[20]

> (i) the existence of a trust or fiduciary duty;
>
> (ii) a breach of that trust or fiduciary duty by a trustee or fiduciary that results in loss;
>
> (iii) participation by a defendant third party (a stranger to the trust) by assisting in the breach of trust or fiduciary duty; and
>
> (iv) dishonesty on the part of the defendant.

---

[20] CA judgment, above n 1, at [22].

[47] The Court rejected the firm's submission that there should be a further component: that the plaintiff must be a beneficiary of the trust or fiduciary relationship. The Court considered it arguable that the pool of plaintiffs should not necessarily be confined to direct beneficiaries of a trust or fiduciary relationship but that it could extend to persons who were prospective beneficiaries under the testator's will.[21]

[48] The Court also rejected the firm's submission that, while an enduring power of attorney involves authority to deal with the donor's property as the donor's agent, it does not give rise to a trust, constructive or otherwise.[22] The Court held that a breach by the holder of an enduring power of attorney of the fiduciary duty owed to the donor in the course of the exercise of the power could satisfy the first and second components of the test for dishonest assistance.[23]

[49] The Court was not satisfied Mr Sandman would be unable to prove that there had been a breach of the fiduciary duties owed.[24] The firm's submission was that there was no breach because Mrs Sandman had executed the 2010 will herself and that there could be no suggestion it came about through some dealing or transaction by Vicky acting as Mrs Sandman's attorney. The Court said:

> [47] We accept that the mere fact that a person is a fiduciary does not automatically render wrongdoing a breach of the fiduciary duty owed. However while at trial it may be shown to be the case that, if there were actions on the part of Vicky or Mr Giboney that were wrongful, such actions were not within the scope of the exercise of the [enduring powers of attorney], on the state of the evidence at this juncture the Firm has not satisfied us that Mr Sandman could not establish the second component of the cause of action.

[50] On the third and fourth components, the Court held that the firm had to satisfy the Court that Mr Sandman could not, by reference to an objective standard, establish that it had acted dishonestly.[25] In this regard, the Court first examined the pleadings on dishonesty. It noted that there were no specific particulars pleaded relating to

---

21 At [24].
22 At [41]–[42].
23 At [42].
24 At [45].
25 At [66]–[67].

dishonesty on the firm's part[26] and concluded none of the allegations in the statement of claim were indicative of dishonesty.

[51] The Court considered there were two allegations that were possibly relevant to the pleading: the firm acted for both Vicky and Mrs Sandman; and the firm allegedly breached confidentiality. The Court said that neither of those factors were indicative of dishonesty.[27]

[52] The only other allegation related to knowledge of testamentary capacity and, in particular, the firm's failure to obtain medical evidence of Mrs Sandman's testamentary capacity at the time of execution of the will.[28] The Court said that ideally the doctor might have been asked to examine Mrs Sandman closer to the date of execution of the will but considered that no adverse inference about Ms Paul's motivations could fairly be drawn from the time gap. The Court noted that it was Ms Paul who had suggested getting a medical certificate.[29]

[53] Furthermore, given Ms Paul's observations at the date of execution and her knowledge that Mr Mellett also considered there was no reason to suspect Mrs Sandman was mentally incapable, the Court said there was no basis for doubting the good faith of Ms Paul's assessment that Mrs Sandman had not lost testamentary capacity since the doctor had seen her two months earlier.[30]

[54] The Court said that it did not attribute significance to the fact Ms Paul took instructions from Mrs Sandman concerning her will in the presence of Vicky. The Court considered it "entirely understandable that a woman of Mrs Sandman's advanced years would wish to have her daughter present at a meeting with her legal adviser".[31]

[55] The Court then conducted a detailed analysis of the allegations made in the submissions and of evidence that might bear on dishonesty. It held that the "grave

---

26 At [69]–[77].
27 At [70]–[71].
28 At [72]–[75].
29 At [76].
30 At [77].
31 At [80].

allegation" of dishonesty "was not only unsubstantiated but was comprehensively rebutted by Ms Paul's detailed affidavit".[32] The Court acknowledged counsel's argument that Ms Paul had not been cross-examined and therefore her evidence had not been tested. The Court considered, however, that the issue was whether the firm's conduct was honest when measured by an objective standard. In the Court's view "all the points of criticism have been aired and satisfactorily answered".[33] Viewed realistically the Court said that the allegation of dishonesty was without merit.[34]

[56] The Court also dealt with an evidentiary issue. Mr Sandman had filed two affidavits in opposition to the firm's applications. One of these annexed an affidavit of Mr Sandman filed in a Family Court proceeding against Mr and Mrs Giboney, as well as affidavits from five other people that had been filed in that proceeding. The firm objected to the admissibility of the affidavits from those five people. The Court of Appeal agreed that the evidence was hearsay and was not persuaded that the affidavits should be admitted under s 18 of the Evidence Act 2006.[35] The Court therefore did not take those affidavits into account.

Mr Sandman's submissions

[57] Mr Dillon argues that the Court of Appeal was wrong to exclude the affidavits filed in the Family Court proceedings. He accepts that none of the affidavits refer to the firm or its knowledge of Mrs Sandman's mental capacity. Nevertheless, he says, they provide evidence regarding the testamentary capacity of Mrs Sandman at the relevant time, and support for the allegation that Vicky and Mr Giboney were involved in Mrs Sandman's affairs before the 2010 enduring powers of attorney were signed and had knowledge of her lack of mental capacity.

[58] On summary judgment, Mr Dillon submits that the Court of Appeal was wrong to conclude that the untested evidence of the firm was determinative of the issues that would have to be resolved at trial, particularly in light of the firm's alleged failure to make the required and expected inquiries as to Mrs Sandman's testamentary capacity

---

32 At [90].
33 At [91].
34 At [91].
35 At [35].

in December 2010. In Mr Dillon's submission, the high threshold for summary judgment was not met.

[59] As to dishonest assistance, Mr Dillon submits that the steps taken by Vicky and Mr Giboney to replace a valid will with an invalid will breached their fiduciary duties to the late Mrs Sandman and to the beneficiaries of the valid will. It is asserted that the firm assisted in that breach, knowing that Mrs Sandman was not mentally competent and that the 2010 will represented Vicky's wishes and not those of Mrs Sandman.

[60] It is further submitted that, once Mrs Sandman became incapacitated, she was not capable of making a new will. This meant that Mr Sandman, as a beneficiary of the 2005 will, had an inchoate interest in the property of Mrs Sandman that would pass to him under the only valid will (the 2005 will). On Vicky's death, Mr Sandman would become the sole beneficiary under that will. The new will had the effect of removing half of the residuary estate from Mr Sandman.

[61] In addition, it is submitted that the position of the firm as solicitors to both Vicky and Mrs Sandman was a conflict of interest. In Mr Dillon's submission, the firm should have ensured that Vicky was not in a position to influence Mrs Sandman. Instead, the firm allowed her to be present at each meeting.

[62] Mr Dillon submits that all of the above gave rise to a constructive trust in Mr Sandman's favour.

The firm's submissions

[63] The firm submits that the Court of Appeal should have struck out the claim because Mr Sandman's pleading does not disclose an arguable cause of action.

[64] First, it is submitted that Mr Sandman was not a beneficiary of any relevant trust or constructive trust or fiduciary duty (even if a fiduciary duty suffices) and he does not plead that he was. He therefore has no standing to bring a cause of action in dishonest assistance against the firm. Mr Sandman was no more than a potential beneficiary under a will that had not come into effect, meaning that no trust was in

existence at the time of the impugned conduct. Nor did Mr Sandman have a beneficial interest in any property under either the 2005 or the 2010 will, because "[w]ill makers are free to make, unmake and alter their wills on any terms up to death". No trust was established by the execution of either the 2005 will or the 2010 will while Mrs Sandman was alive.

[65] Secondly, the firm submits that there is no pleaded or arguable breach of a relevant trust or constructive trust in which it can be said to have assisted. Even if the cause of action for dishonest assistance extends to breach of fiduciary duty, the pleaded breach, procuring the execution of a will, does not constitute a breach of the fiduciary duty alleged. It is argued that the enduring power of attorney "did not give Vicky the power to create a will or gift property by way of a will unless the Court authorised her to execute a will being satisfied that Mrs Sandman did not have testamentary capacity".[36]

[66] It is submitted in any event that the Court of Appeal erred when it held that it was arguable that a mere breach of fiduciary duty was sufficient for a claim for dishonest assistance. A trust or constructive trust is required. Expanding dishonest assistance outside this limit would be an unjustified leap into indeterminate third party liability.[37]

[67] Finally, the firm submits that there is no pleaded allegation of dishonesty and no proper foundation laid for such a pleading.[38]

[68] The firm also supports the grant of summary judgment and says that summary judgment could also have been granted on the basis of the matters said to justify strike-out. It also supports the exclusion of the affidavits, although it submits that these did not in any event advance Mr Sandman's case.

---

36 Pursuant to the Protection of Personal and Property Rights Act 1988, s 102(2)(j).

37 It is submitted that the decision of the Court of Appeal of England and Wales in *Novoship (UK) Ltd v Mikhaylyuk* [2014] EWCA Civ 908, [2015] QB 499 should not be adopted in New Zealand.

38 As required in *Brown v Bennett* [1998] 2 BCLC 97 (Ch) at [107].

Evidence

[69] We accept Mr Sandman's submission that the Court of Appeal should not have ruled the affidavits filed in the Family Court inadmissible. Those affidavits do not address the firm's knowledge. They are, however, relevant to the issue of Mrs Sandman's capacity and thus could provide some support for the submission that the firm either knew or was wilfully blind to her incapacity.[39]

[70] The affidavits were filed in other proceedings and there was nothing to suggest they did not represent the genuine views of the deponents. Requiring the deponents to swear similar affidavits in opposition to these applications would have caused Mr Sandman unnecessary expense and inconvenience.

Summary judgment

[71] To recap, Mr Sandman alleges that, because of Mrs Sandman's lack of capacity, the terms of the 2010 will must have reflected Vicky's wishes and not those of Mrs Sandman. The undue influence is said to be shown by the firm acting for both Mrs Sandman and Vicky and also by Vicky's presence at the meetings Ms Paul had with Mrs Sandman.

[72] It is not alleged that any undue influence arose independently of the alleged lack of capacity or that Vicky benefited personally from any such influence. Nor could such an allegation sensibly be made. We make the obvious point that Vicky was actually worse off under the 2010 will than she had been under the 2005 will as the 2010 will did not contain the $200,000 bequest. Nor, given Mr Sandman was a beneficiary of Vicky's will,[40] does it appear that Vicky had major animosity towards Mr Sandman.

[73] We also note that, according to the contemporary documentation, Vicky had not wanted Mrs Sandman to change her will in February 2010 to compensate Vicky for the assistance given to Mr Sandman by Mrs Sandman and her husband.[41] This

---

39 Some of the affidavits also address Mr Sandman's medical condition. These provide further background to the correspondence referred to at [21]–[22] above.

40 Above at [34].

41 Above at [8].

meant that the 2005 will was left in place at that stage. It is also significant that, again according to contemporary documentation, Ms Paul saw Mrs Sandman after Vicky's death to go over the terms of her will and Mrs Sandman advised she did not wish to change the 2010 will.[42]

[74] As pleaded against the firm, Mrs Sandman's lack of capacity is shown by the fact that Vicky used a copy of the power of attorney certified by the firm to gain control of Mrs Sandman's ASB bank accounts from January 2010 and that Vicky and/or Mr Giboney otherwise had control over Mrs Sandman's affairs.[43] It is also pleaded that Dr Buckley certified capacity some two months before the 2010 will was executed.

[75] In addition, Mr Sandman relies on his own opinion, and other contemporary views, of Mrs Sandman's lack of capacity as outlined in his correspondence with Ms Paul[44] and in his affidavits and the attached affidavits filed in the Family Court. He also relies on Mrs Sandman's medical records.[45] Finally, he relies on the fact that some of Mrs Sandman's affairs were managed during 2010 by Vicky and/or Mr Giboney.[46]

[76] The Court of Appeal granted summary judgment on the basis that the material before the Court showed conclusively that there was no dishonesty on the part of the firm. The question is whether it was correct to do so.[47]

[77] In dishonest assistance claims, New Zealand courts[48] have followed the approach of the Privy Council in *Royal Brunei Airlines Sdn Bhd v Tan*[49] and *Barlow*

---

42 Above at [29].
43 See above at [42].
44 Above at [21].
45 Above at [9]–[10].
46 Above at [10] and [15].
47 Rule 12.2(2) of the High Court Rules 2016 governs summary judgment.
48 *Westpac New Zealand Ltd v MAP & Associates Ltd* [2011] NZSC 89, [2011] 3 NZLR 751 [*Westpac v MAP*] at [25]–[27]. *Westpac v MAP* has been followed in *Fletcher v Eden Refuge Trust* [2012] NZCA 124, [2012] 2 NZLR 227 at [66]–[67]; and *Spencer v Spencer* [2013] NZCA 449, [2014] 2 NZLR 190 at [128]–[131].
49 *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 (PC) [*Royal Brunei*]. The first New Zealand appellate case to follow *Royal Brunei* was *US International Marketing Ltd v National Bank of NZ Ltd* [2004] 1 NZLR 589 (CA) at [4]–[7].

Clowes International Ltd (in liq) v Eurotrust International Ltd.[50] The test for dishonesty is an objective one, judged against the background of what the defendant subjectively knew. If a defendant's mental state would be described as dishonest by ordinary standards, it is irrelevant that the defendant does not consider his or her conduct to be dishonest and/or does not appreciate that, by ordinary standards, it would be regarded as dishonest.[51]

[78] A defendant is dishonest if he or she has actual knowledge that the transaction is one in which the defendant cannot honestly participate.[52] Wilful blindness, which equates in equity with actual knowledge, also suffices. This arises where a defendant strongly suspects a breach of trust but makes a deliberate decision not to inquire in case the inquiry results in actual knowledge. It is "necessary that the strength of the suspicion … makes it dishonest to decide not to make inquiry".[53]

[79] The case was argued on the basis that Ms Paul knew Vicky and Mr Giboney were breaching a fiduciary duty. In the context of this case, this means the argument is that Ms Paul assisted them by preparing a will and having it executed, either knowing or wilfully blind to the fact that Mrs Sandman lacked capacity. This submission must be assessed against the background that Mrs Sandman was a client of the firm.

[80] When acting for a client, solicitors have a duty to follow their clients' instructions.[54] Solicitors also, however, need to provide the relevant advice and information to ensure the client is in an appropriate position to give informed

---

50 *Barlow Clowes International Ltd (in liq) v Eurotrust International Ltd* [2005] UKPC 37, [2006] 1 All ER 333 [*Barlow Clowes*].

51 *Westpac v MAP*, above n 48, at [26], citing *Barlow Clowes*, above n 50, at [10]–[12]; see also *Royal Brunei*, above n 49, at 389.

52 *Westpac v MAP*, above n 48, at [27], citing *Barlow Clowes*, above n 50, at [10]; see also *Royal Brunei*, above n 49, at 389.

53 *Westpac v MAP*, above n 48, at [27].

54 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008. The Preface of the Rules provides that lawyers must act "in accordance with instructions received and arrangements made". Rule 4.1 provides that there must be good cause to refuse instructions. There is, under r 4.2, a duty to complete the services required by a client under a retainer. A lawyer cannot unilaterally terminate the retainer without good cause and notice to the client. Good cause includes instructions that require the lawyer to breach any professional obligation or the inability or failure of a client to pay an agreed fee. Rule 3.1 provides that lawyers cannot act in a discriminatory manner. See also below n 58.

instructions.[55] Where the instructions are to prepare a will in circumstances where there might later be issues raised about capacity, the lawyer should carefully document the advice given and the steps taken. In this regard, it would be prudent for a solicitor to suggest that a medical certificate be obtained.[56] It would also be prudent to document the reasons for the provisions of the will and the process involved in taking instructions and in ensuring that the instructions had been correctly understood.[57]

[81] It is certainly arguable that once the steps set out above have been taken it would not be up to the solicitor, who is not a medical expert, to decide whether a client has testamentary capacity and thus to decide whether to follow his or her instructions.[58] The position arguably is that a solicitor, even if he or she does not think a client has capacity, would nevertheless be obliged to prepare and arrange for the execution of the will. The issue of actual capacity would then be decided after the client's death, on the basis of the evidence including expert medical evidence.

[82] We are prepared, however, for the purposes of this appeal, to assume that the fact Mrs Sandman was a client of the firm is not a complete answer to the claim for dishonest assistance and that the firm could be liable in dishonest assistance if Ms Paul knew that Mrs Sandman lacked capacity or was wilfully blind to this. This must be assessed against the background of the steps taken by the firm in preparing the will.

[83] The first point is that Ms Paul prudently suggested that a medical certificate be obtained. It was obtained from Dr Buckley on 28 October 2010. Mr Sandman submits

---

55 One of the fundamental obligations of lawyers is to act in accordance with all fiduciary duties and duties of care owed by lawyers to their clients: Lawyers and Conveyancers Act 2006, s 4(c). That fiduciary duty requires a lawyer to ensure the client has sufficient information to give informed instructions: see Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at [10.3], see also [5.4.1].

56 We use the term prudent because we do not need to decide for the purposes of this appeal the extent of the duty of a solicitor in these circumstances. Any views we express on solicitors' duties in this context are necessarily tentative as we have heard no detailed argument on this. This is because there is no direct claim against the firm in this case.

57 Depending on the circumstances, for example where there is an issue of undue influence, further steps may be necessary. We do not need to discuss those steps as in this case the allegation of undue influence arises only because of the alleged lack of capacity.

58 In this regard, it is relevant that New Zealand is a party to the United Nations Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008). The Convention provides for the principle of individual autonomy for persons with disabilities, including the freedom to make one's own choices, as part of respecting human dignity: art 3(a).

that an updated medical certificate should have been sought, given Dr Buckley had last seen Mrs Sandman on 30 September 2010. Assuming Mrs Sandman agreed, it would certainly have been prudent to do so.

[84] We note, however, that there is no allegation in the pleadings that there had been a major decline in Mrs Sandman's condition in the period from 30 September (when Mrs Sandman was last seen by Dr Buckley) to 2 December (when the will was executed). The gap between those dates is only two months. The gap between the date the doctor last saw Mrs Sandman and the date instructions were taken (19 October 2010) was even shorter.

[85] It has not been suggested that Mrs Sandman suffered any injury or illness between the date she was last seen by Dr Buckley and the execution of the will. Nor is there evidence to support that her condition had otherwise rapidly deteriorated over the two month period between seeing Dr Buckley and execution of the will. Mrs Sandman had been seen by a gerontology nurse specialist in September 2010 – one month before the firm received instructions – and had been allowed to return to independent living. She remained living independently in her unit in the Village until mid-2012 when concerns were raised about her needing further help.

[86] It is also significant that Ms Paul saw Mrs Sandman on 29 November 2011 after Vicky's death and considered that she was mentally more alert, noting that could have been due to a new hearing aid. This shows, at the least, that Ms Paul's perception was that Mrs Sandman's capacity had not declined in the year since the will was executed.

[87] Ms Paul, again prudently, documented the reasons for the provisions of the will in the statutory declaration and also documented the process involved in taking instructions and in ensuring that these instructions had been correctly understood. In this case the contemporary documentation shows Ms Paul recording her understanding of Mrs Sandman's instructions in correspondence to her, as well as seeking further instructions on outstanding issues.[59] Mr Sandman points out that this correspondence was sent to Mr Giboney and not to Mrs Sandman directly. This was, however, said to

---

[59] Above at [23] and [28].

be at Mrs Sandman's request.[60] The letter sending the draft will in any event seems to have been addressed to Mrs Sandman at the Village.

[88] The contemporary documentation gives no indication that Ms Paul doubted Mrs Sandman's capacity. To the contrary, it is consistent with her being satisfied Mrs Sandman was competent.[61]

[89] Further, there was nothing to suggest to Ms Paul that she could not rely on Dr Buckley's certificate. Mrs Sandman had been Dr Buckley's patient for eight years and therefore the certificate was given by a doctor who was aware of Mrs Sandman's recent medical history and who was comfortable giving the certificate even though she had seen Mrs Sandman a month before she certified competence.

[90] In addition, there was nothing in the terms of the 2010 will itself to raise doubts as to capacity. The terms are explicable in the circumstances explained in the statutory declaration signed at the time of making the will. There is nothing in the terms that suggests irrationality and therefore nothing that should have alerted Ms Paul to any risk of lack of capacity that had up to that point not manifested itself to her.

[91] We note too that Mr Sandman's own letter of 31 October 2010 gives the impression of a woman who did not hesitate to express her own opinions. We make the obvious comment that the fact Mrs Sandman's opinions did not coincide with those of Mr Sandman does not necessarily indicate lack of capacity.

[92] Mr Sandman relies on the fact that in 2010 Vicky (and Mr Giboney) were acting for Mrs Sandman under the enduring power of attorney related to property. We do not consider that this alone shows incapacity. It is not unusual for elderly people who may be frail and less mobile to have others act for them, even if they are fully competent to manage their own affairs. Further, the enduring power of attorney for property had become operative immediately and was not dependent on Mrs Sandman being mentally incapacitated.

---

60 Above at [15].
61 See above at [18]–[19].

[93] Against this background, we do not consider that there could be any argument that the firm strongly suspected Mrs Sandman was incompetent and deliberately decided not to inquire in case that inquiry resulted in actual knowledge. We note in particular the medical certificate and the fact that, while Mrs Sandman had what has been described as mild dementia, she had nevertheless been cleared to live independently.

[94] This means that, in order to succeed at trial against the firm, Mr Sandman would have to prove that the contemporary documentation did not reflect what had occurred and that the relevant documents were effectively constructed by Ms Paul at the time to mask her actual knowledge of Mrs Sandman's incapacity. No reason has been suggested as to why she would risk her professional integrity and her career in this manner. We make the obvious point that she was not a beneficiary of the 2010 will and that she did not receive any direct benefit from the fees paid for her legal work, given she was a salaried staff solicitor at the firm and not a partner.

[95] Further, in order to impugn the contemporary documentation, it would also have to be shown by Mr Sandman that Dr Buckley had given a certificate as to capacity that she knew to be wrong, and that the independent solicitor, Mr Mellett, also gave a false certificate. Again, no reason has been suggested as to why either Dr Buckley or Mr Mellett would risk their careers in this manner.

[96] Mr Dillon's only suggestion at the hearing was that Mr Mellett might have been misled by the doctor's certificate and Ms Paul's assurances that Mrs Sandman had capacity in her instruction letter. Mr Mellett was nevertheless obliged by statute to provide the certification and he saw Mrs Sandman on her own to satisfy himself that she had the capacity to, and that she did, understand the 2010 powers of attorney. It is inconceivable in this context that Mr Mellett would have signed the certificate if Mrs Sandman's lack of capacity was as obvious as Mr Sandman asserts.

[97] Summary judgment will be inappropriate where there are factual disputes and, in particular, credibility issues that cannot be resolved on the basis of the affidavit evidence.[62] All of the above means, however, that Ms Paul's credibility is not at issue.

---

[62] AC Beck and others *McGechan on Procedure* (looseleaf ed, Thomson Reuters) at [HRPt12.2.03].

This is a case where contemporary documentation makes it clear that Ms Paul did not doubt Mrs Sandman's capacity and was not wilfully blind to that possibility. The case against the firm in dishonest assistance cannot succeed and the Court of Appeal was correct to grant summary judgment.

Strike-out

[98] The focus of the argument in this Court was on summary judgment. That was not surprising, given that neither the High Court nor the Court of Appeal addressed the strike-out application in any detail. The firm did, however, seek to support the Court of Appeal's judgment on the grounds that the claim should have been struck out.[63] Given our conclusion upholding summary judgment, we comment on the strike-out point only briefly.[64]

[99] Mr Dillon made it clear that Mr Sandman does not suggest that the firm owed any duty to him. Rather, Mr Sandman's case, as explained by Mr Dillon at the hearing, is that Ms Paul assisted Vicky and Mr Giboney to breach the enduring powers of attorney, under which Vicky and Mr Giboney owed fiduciary duties to Mrs Sandman. However, he did not explain how the steps taken by Ms Paul to carry out Mrs Sandman's instructions to make a new will involved any action on the part of Vicky or Mr Giboney under the enduring powers of attorney that could amount to a breach of fiduciary duty on their part. The pleaded breach is that Vicky and Mr Giboney obtained control of the affairs of Mrs Sandman "and in particular the execution of [the new] will".[65] But there is nothing to indicate what either Vicky or Mr Giboney did was in breach of the fiduciary duties under the enduring powers of attorney.[66]

---

63 Above at [41].

64 Rule 15.1(1)(a) of the High Court Rules 2016 empowers the court to strike out all or part of a proceeding if it "discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading".

65 Paragraph 23 of the statement of claim, set out at [45] above.

66 As the firm points out, the 2010 will was not made under a power granted under the enduring power of attorney.

[100] This means that even if we were to accept that:

(a) it is sufficient in a dishonest assistance claim that there be a breach of fiduciary duty, rather than a breach of trust;[67] and

(b) it is not necessary that Mr Sandman be the party to whom the fiduciary duty is owed;[68]

there is simply no pleading of a breach on which Mr Sandman can base his case and nothing advanced in argument before us to indicate that any such breach occurred.

[101] That being the case, there is no breach of trust or fiduciary duty that Ms Paul could have dishonestly assisted and therefore no arguable cause of action. This shortcoming in Mr Sandman's case was highlighted to his counsel at the hearing. As mentioned above, counsel was unable to identify any action relating to the 2010 will that amounted to a breach of fiduciary duty owed to Mrs Sandman under the enduring powers of attorney. Nor did he suggest that Vicky or Mr Giboney had any fiduciary duty to Mrs Sandman that was not founded on the enduring powers of attorney. More generally, he did not indicate that there was any other potential amended pleading to get around this gap in the pleaded case. In the absence of an adequate pleading or a proposal to amend the pleading to make it adequate, the firm had a strong case for strike-out.

Result and costs

[102] The appeal is dismissed.

[103] We award costs of $25,000 plus usual disbursements to the respondents.

---

67 We do not need to decide for the purposes of this proceeding on the submission that a fiduciary relationship can suffice for dishonest assistance.

68 We note the Chief Justice's view (at [172] of her reasons below) that it is fatal to Mr Sandman's claim that he was not a beneficiary under a trust and that no fiduciary duty was owed to him by Vicky and Mr Giboney. Given our approach, it is not necessary for us to address this issue.

ELIAS CJ

[104] I am of the view that summary judgment ought not to have been entered by the Court of Appeal. I consider the claim of dishonest assistance made against Wilson McKay turns on facts which cannot be determined on summary application. Mine is a minority opinion on this point. Although I would allow Mark Sandman's appeal against the entry of summary judgment, I consider his claim as pleaded is untenable in law and should be struck out.

[105] The background is covered in the reasons delivered by Glazebrook J.[69] I do not repeat it.

Summary and outline of reasons

[106] In my reasons, I begin by referring briefly to the principles on which strike-out and summary judgment are exercised.[70] They are not contentious but they provide the context for the discussion that follows. I also summarise the history of the appeal.[71]

[107] I indicate why I consider the Court of Appeal ought not to have "put to one side" the pleading in which Mark Sandman relies not on the secondary or accessory liability of the firm for assistance in breaches of duties owed by Victoria Sandman or Robert Giboney, but on duties owed directly by Wilson McKay to Elizabeth Sandman. I conclude however that the damages sought could not be obtained in such a claim for breaches of duties directly owed to Elizabeth Sandman by Wilson McKay.

[108] In relation to the accessory liability claim, I express reservations about whether the fault required for a solicitor who assists by acting for someone the solicitor knows lacks testamentary capacity or is being unduly influenced is appropriately pitched at the level of dishonesty, as is established on the authorities for stranger assistance particularly in a commercial context.[72] On the assumption that dishonesty is required, however, I am of the view that a solicitor who acts for a client is "not acting as an

---

69 Above at [3]–[34].
70 Below at [111]–[114].
71 Below at [115]–[119].
72 Below at [127]–[130].

honest person would in the circumstances" if the solicitor knows that the client lacks testamentary capacity or is being unduly influenced in the transaction in which the solicitor acts.[73]

[109] I consider that the Court of Appeal was wrong to conclude on summary application that Wilson McKay has excluded dishonesty in this sense being established by Mark Sandman. In agreement with the other members of this Court, I consider the Court of Appeal should not have excluded the affidavits annexed by Mark Sandman to his own affidavit. They seem to me to bear on the knowledge of the firm as well as the question of Elizabeth Sandman's capacity. Other evidence so far available bearing on the firm's knowledge appears from its correspondence and the circumstances of Elizabeth Sandman's impairment and dependency. I consider both Elizabeth Sandman's own capacity and dependency and the extent to which any material impairment or influence was known to the firm cannot be resolved without hearing. In this I differ from the analysis of the majority in this Court. I would set aside the summary judgment entered for the defendant.[74]

[110] Finally, I explain why I accept the submission of Wilson McKay that Mark Sandman cannot claim as a beneficiary of a trust or fiduciary duty on the basis of his potential interest under the 2005 will.[75] I consider he does not qualify to bring an action for knowing assistance in breaches of any such trust or fiduciary duty. Any claim he has for the loss he says he has suffered would have to be brought on the basis of duties directly owed to him by the firm. I would therefore strike out his claim made on the basis of Wilson McKay's knowing assistance in breaches of trust or fiduciary duty by Victoria Sandman and Robert Giboney.

Strike-out and summary judgment

[111] If a claim is untenable on the pleadings as a matter of law, the defendant may apply under r 15.1(1)(a) of the High Court Rules 2016 for an order striking it out. That does not prevent the plaintiff repleading and bringing a further, properly-constituted claim.

---

73 Below at [129] and [131]–[132].
74 Below at [162].
75 Below at [168]–[172].

[112] The defendant may also apply for summary judgment under r 12.2(2) of the High Court Rules where able to satisfy the court that "none of the causes of action in the plaintiff's statement of claim can succeed". Because summary judgment creates an issue estoppel between the parties, preventing further claim for the same wrong, a defendant may obtain summary judgment on summary application without full hearing only if the defendant is able to demonstrate a clear answer to all the plaintiff's claims against him.[76] The approach is rightly described as "exacting" because it is a serious thing to stop a plaintiff bringing a claim unless it is quite clearly hopeless.[77]

[113] Summary judgment may be entered or a claim may be struck out on the basis that it is untenable as a matter of law, even if the decisive point of law is one of some difficulty, requiring substantial argument.[78] But where the cause of action is novel or where established principle must be applied to novel circumstances, peremptory determination in the absence of full understanding of context established at a hearing of the facts is often not appropriate.[79] A court may refuse summary judgment if amendment to the statement of claim reasonably in prospect would raise a cause of action upon which the court is not satisfied the plaintiff could not succeed.[80]

[114] If the defendant has a complete answer to the claim on facts which are not disputed or which can be conclusively established summarily, such facts may be proved by affidavit evidence on application for summary judgment. So, for example, the defendant may be able to demonstrate that he is the wrong party to the claim, or that he has the benefit of a privilege or immunity, or that the terms of a contract or deed relied on by the plaintiff are inconsistent with the claim. Such peremptory determination is available only in clear cases because truncated process risks breach of natural justice and error. Where it is available because there is a clear answer to a

---

76 *Westpac Banking Corp v MM Kembla New Zealand Ltd* [2001] 2 NZLR 298 (CA) at [60].

77 *Jones v Attorney-General* [2003] UKPC 48, [2004] 1 NZLR 433 at [10].

78 See *Westpac Banking Corp v MM Kembla New Zealand Ltd* at [62]; and *European Asian Bank AG v Punjab and Sind Bank* [1983] 2 All ER 508 (CA) at 516 in relation to summary judgment. See *Gartside v Sheffield, Young & Ellis* [1983] NZLR 37 (CA) at 45; *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) at 267; and *North Shore City Council v Attorney-General* [2012] NZSC 49, [2012] 3 NZLR 341 at [146] in relation to strike-out.

79 *Westpac Banking Corp v MM Kembla New Zealand Ltd* at [62]; *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33]; and *North Shore City Council v Attorney-General* at [146].

80 *Westpac Banking Corp v MM Kembla New Zealand Ltd* at [67]–[68]; and *Bernard v Space 2000 Ltd* (2001) 15 PRNZ 338 (CA) at [31].

claim, summary judgment will save much time and cost. But if a case is not clear-cut, the shortcut may prove longer and costlier in the end.

The history of the appeal

[115] Wilson McKay applied to the High Court for summary judgment and, in the alternative, for orders striking out the claim against it. It was unsuccessful in the High Court.[81] Judge Christiansen considered the statement of claim was adequate to indicate "the knowledge of Wilson McKay from which a claim of knowing assistance is identified" and should not be struck out.[82] The Judge held that neither strike-out nor summary judgment was appropriate because the case turned on "careful examination of individual facts":[83]

> This case is about whether sufficient effort was made by Wilson McKay and that should not be a matter for consideration upon the present applications but rather for trial in due course.

[116] Wilson McKay appealed successfully to the Court of Appeal. The Court allowed the appeal and entered summary judgment on the basis that Wilson McKay had satisfied it that the cause of action pleaded against it could not succeed.[84] Because it entered summary judgment, the Court did not consider Wilson McKay's application for review of the dismissal of the application to strike out the cause of action (which had been removed into the Court of Appeal for hearing with the summary judgment appeal).[85]

[117] In the Court of Appeal, the claim was treated as turning on Wilson McKay's knowing assistance in breaches of trust or fiduciary duty by Victoria Sandman or Robert Giboney. The Court of Appeal was not satisfied that Mark Sandman would not be able to establish at trial that Victoria Sandman or Robert Giboney acted in breach of trust or fiduciary duties.[86] But it considered that Wilson McKay had demonstrated that Mark Sandman would not be able to show that the assistance it provided was

---

81 *Sandman v Giboney* [2017] NZHC 1832 [HC judgment].
82 At [101]–[102].
83 At [94] and [98].
84 *McKay v Sandman* [2018] NZCA 103, [2018] NZAR 707 (Brown, Brewer and Collins JJ) [CA judgment] at [92]–[93].
85 At [93]. See also CA judgment at [5] in relation to the history of the strike-out application.
86 At [45] and [47].

"dishonest assistance by the preparation of a will in the knowledge that it was contrary to the testator's intentions".[87]

[118] On appeal by Mark Sandman to this Court, the principal question is whether the Court of Appeal was right to enter summary judgment for Wilson McKay.[88] Wilson McKay has given notice that it supports the summary judgment also on the grounds that, contrary to the determination of the Court of Appeal, it had demonstrated that Mark Sandman could not establish "breach of trust or breach of fiduciary duty in connection with a constructive trust".

[119] Wilson McKay has also given notice of its intention to argue that the claim should have been struck out by the Court of Appeal. It argues that Mark Sandman was not the beneficiary of a trust and could not claim for accessory or secondary liability for the firm's dishonest assistance in any breach.

The claim not made and the claim "put to one side"

[120] Mark Sandman has not claimed for breach of duties of care owed directly by Wilson McKay to him as a beneficiary under the 2005 will. Such liability could arise in negligence on the principles discussed by Sir Robert Megarry VC in *Ross v Caunters*[89] and by the House of Lords in *White v Jones.*[90] A claim might face difficulties on the basis of the legal policies discussed in cases such as *Knox v Till* if the interests of the testator and the beneficiary do not coincide (as they have been treated as coinciding in the cases of dilatory or defective execution of wills).[91] But the law cannot be regarded as settled and direct liability in negligence to beneficiaries under wills may arise "in the light of the particular facts" (as was left open by Lord Nicholls in *Royal Brunei Airlines Sdn Bhd v Tan*).[92]

---

87 At [89] and [91]–[92].
88 Leave to appeal was granted in *Sandman v McKay* [2018] NZSC 71.
89 *Ross v Caunters* [1980] Ch 297 (Ch).
90 *White v Jones* [1995] 2 AC 207 (HL).
91 *Knox v Till* [1999] 2 NZLR 753 (CA).
92 *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 (PC) at 392.

[121] Mark Sandman does not however make any such direct claim based on duties of care owed to him. Indeed he expressly disavowed reliance on any such direct cause of action against the firm at the hearing of the appeal.

[122] The firm's assistance with, and knowledge of, testamentary incapacity and undue influence (such as is alleged) also raises questions of its direct liability to Elizabeth Sandman for breaches of duties it owed her. A claim for breach of duties directly owed to Elizabeth Sandman by Wilson McKay would not depend on accessory or secondary liability. Nor would it require proof of dishonesty. Want of care or breach of fiduciary obligations owed directly by the firm to Elizabeth Sandman as its client would be sufficient for liability for loss. Such a claim could have been brought on behalf of Elizabeth Sandman's estate by Mark Sandman as someone materially affected, if the executors did not act or were, as here, conflicted.[93]

[123] I consider such a claim for breach of duties owed by the firm directly to Elizabeth Sandman was in substance available on the pleadings,[94] although it was "put to one side" by the Court of Appeal.[95] It thought such allegations "clouded" the claim, which it treated as one for accessory liability alone.[96] I am of the view the Court of Appeal ought not to have excluded the direct claim for breach of duties owed by Wilson McKay to Elizabeth Sandman. It meant that the sole cause of action was seen as stranger or "third party" assistance in a breach of trust or fiduciary duty.[97]

[124] The characterisation is questionable. Solicitors engaged by trustees fall within the first category of third parties discussed by Lord Nicholls in *Royal Brunei Airlines v Tan*. They are "accountable to the trustees for their conduct" because they owe the

---

93 See *Field v Firmenich & Co* [1971] 1 All ER 1104 (Ch); *Hayim v Citibank NA* [1987] AC 730 (PC) at 748; and *Cowan v Martin* [2014] NZCA 593, [2015] NZAR 1197 at [53].

94 The statement of claim contains allegations claimed to be causative of loss which are not confined to accessory liability piggybacking on any breach of trust or fiduciary duty by Victoria Sandman and Robert Giboney. That is how Mark Sandman characterised his claim in his first affidavit in opposition to the summary judgment application. Wilson McKay, in its submissions in this Court, argued that the claim in substance was one in which Mark Sandman sought to stand in the shoes of Elizabeth Sandman, a claim it said could be brought only by her personal representatives. The Court of Appeal too noted in its judgment at [38] that Mark Sandman claimed "that the Firm owed fiduciary duties to Mrs Sandman which they breached causing harm to Mr Sandman, being a person in contemplation as likely to suffer harm as a beneficiary under the 2005 Will".

95 CA judgment at [39].

96 At [38]–[39].

97 The third category of third party liability considered in *Royal Brunei Airlines Sdn Bhd v Tan* at 392, in respect of which dishonesty was required.

trustees duties of care and skill.[98] Lord Nicholls acknowledged that the duties to the trustees could be enforced by the beneficiaries of a trust directly in some circumstances.[99] But the existence of these obligations of care and skill meant that Lord Nicholls considered there was no occasion for imposition of liability based on a duty of care owed directly to the beneficiaries.[100]

[125] Although I consider the Court of Appeal was wrong to put the direct claim to one side, such a claim could only have been for loss to Elizabeth Sandman or her estate. Accordingly, even if the direct claim against the firm on the basis of breach of duties owed to Elizabeth Sandman had not been excluded by the Court of Appeal, it could not have supported the claim for damages put forward in the statement of claim for the loss to Mark Sandman of his interest under the 2005 will. I am of the view such loss could only have been claimed on the basis of breach of duties owed by the firm to Mark Sandman himself. What the potential derivative claim indicates, however, is that positioning the claim based on accessory liability under a category of liability developed for stranger interference in breaches of trust by dishonest trustees is awkward and may have implications for the fault required for accessory liability here.[101]

Accessory liability

[126] The Court of Appeal treated the accessory liability of a third party for the breach of duties owed by a trustee or fiduciary (the knowing assistance ground of liability referred to in *Barnes v Addy*)[102] as having four components.[103] They are taken from the elements identified in *Royal Brunei Airlines v Tan*: the existence of a trust or, arguably a fiduciary relationship;[104] a breach of trust or fiduciary duty by a trustee or fiduciary resulting in loss; participation by a defendant third party (a stranger to the trust or fiduciary relationship) by assisting in the breach of trust or fiduciary duty; and

---

98 *Royal Brunei Airlines Sdn Bhd v Tan* at 391.
99 *Royal Brunei Airlines Sdn Bhd v Tan* at 391. See also the cases cited above at n 93.
100 At 391.
101 At [128]–[130] below.
102 *Barnes v Addy* (1874) LR 9 Ch App 244 (CA) at 251–252.
103 CA judgment at [22].
104 Whether breach of fiduciary duty is sufficient is not settled. It is a matter not suitable for resolution in these proceedings, as all members of the Court are agreed. See the reasons given by Glazebrook J at [100](a), n 67.

dishonesty on the part of the defendant (that is, want of probity assessed against the standard of how an honest person would act in the circumstances).[105]

[127] The Court of Appeal accepted that Wilson McKay had not discharged the burden of showing that the first three elements were excluded "on the state of the evidence at this juncture"[106] (determinations the firm challenges by notice of intention to support the judgment on other grounds). But it held that the firm had satisfied it that Mark Sandman could not establish that any assistance Wilson McKay had provided to Victoria Sandman or Robert Giboney in any breach of trust or breach of fiduciary duty had been dishonest.[107]

[128] Liability for knowing assistance by a stranger to a trust or relationship of confidence in breaches by the trustee or fiduciary is fault-based, as *Royal Brunei Airlines v Tan* confirmed. In cases of stranger interference in a commercial context, conscious dishonesty or want of probity may be appropriate as the preponderance of authority suggests.[108] But what constitutes dishonesty or want of probity is itself contextual, as Lord Nicholls made clear.[109]

[129] The fault required for liability for knowing assistance in a breach of trust or breach of fiduciary duty is "not acting as an honest person would in the circumstances".[110] Here the circumstances include the fact that the assistance is provided by solicitors themselves under duties of loyalty and care to the person to whom the primary duties are owed by the trustees or those owing fiduciary duties. Whether in that context the fault required for liability for assistance is dishonesty as the Court of Appeal thought was required, is not a matter that I consider to be established on the authorities.

---

105 *Royal Brunei Airlines Sdn Bhd v Tan* at 389.
106 CA judgment at [42] and [47]–[48].
107 At [92].
108 *US International Marketing Ltd v National Bank of NZ Ltd* [2004] 1 NZLR 589 (CA) at [4] and [7]; *Barlow Clowes International Ltd (in liq) v Eurotrust International Ltd* [2005] UKPC 37, [2006] 1 All ER 333 at [10]; and *Westpac New Zealand Ltd v MAP & Associates Ltd* [2011] NZSC 89, [2011] 3 NZLR 751 at [25].
109 *Royal Brunei Airlines Sdn Bhd v Tan* at 389.
110 *Royal Brunei Airlines Sdn Bhd v Tan* at 389.

[130] The case is very different from the paradigms of stranger intervention in a breach of trust in a commercial context discussed in *Royal Brunei Airlines v Tan*, *Barlow Clowes International Ltd (in liq) v Eurotrust International Ltd* and *Westpac New Zealand Ltd v MAP & Associates Ltd*. It may be a different matter where solicitors are strangers to the trust or fiduciary duty, as was the solicitor held liable in *Twinsectra Ltd v Yardley.*[111] But where solicitors owe fiduciary duties and duties of care in the very transaction in which they are said to be liable on an accessory or secondary basis, it is not self-evident that the fault required should not align with their own obligations. The application of the principles upon which assistance will found third-party liability in this different context seems to me to require full consideration in a case where it arises.

[131] In any event, a solicitor who acts in the preparation of a will for a client who is known by the solicitor to lack testamentary capacity or to be acting under undue influence (and actual knowledge of both is alleged here)[112] seems to me to be properly regarded as consciously transgressing the ordinary standards of honest behaviour to be expected of a solicitor. In this Court Mr Dillon explained the effect of the pleading as being to assert that if the firm knew that Elizabeth Sandman did not have testamentary capacity or was being subjected to undue influence, then it acted dishonestly and was liable to Mark Sandman for the loss through revocation of the 2005 will.

[132] Dishonesty, in the sense used in the accessory liability cases, is objectively assessed, but on the facts known to the person assisting.[113] In this respect, I doubt that a solicitor who knows a client to lack testamentary capacity is nevertheless obliged to

---

111 *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164.

112 This is not a case where the plaintiff claims that the solicitor had an obligation to ascertain whether a client had testamentary capacity (the sort of claim made in the *Knox v Till* litigation). Here the plaintiff claims and must prove that Wilson McKay knew that Elizabeth Sandman lacked testamentary capacity or made her will under undue influence.

113 *Barlow Clowes International Ltd (in liq) v Eurotrust International Ltd* at [10]; *Westpac New Zealand Ltd v MAP & Associates Ltd* at [26]; and *Fletcher v Eden Refuge Trust* [2012] NZCA 124, [2012] 2 NZLR 227 at [67].

carry out the client's instructions, leaving capacity to be assessed after death.[114] While the matter would need full argument on the basis of the particular facts, I consider that it is arguable that a solicitor who formed the view that a client lacked capacity or was being unduly influenced would be obliged to withdraw from acting and that it would be a breach of the duties owed by the solicitor to the client for the solicitor to participate in the transaction.

[133] If the firm's knowledge of incapacity or undue influence can be established, as is pleaded, it would as a matter of first impression be surprising if that is not sufficient fault to found liability for its assistance. And although the pleading of knowledge without more is criticised by the Court of Appeal as inadequate for an allegation of dishonesty,[115] it is difficult to see what additional formula is required, especially since particulars of the facts relied on are contained in the statement of claim.

[134] In any event, I do not think lack of dishonesty can confidently be determined without hearing, for reasons to which I will turn after discussing the excluded evidence.

The excluded evidence

[135] Although Mark Sandman had some legal assistance in drafting the statement of claim, he filed it himself and much of the procedural work in the case appears to have been conducted by him in person. The statement of claim is not a model of good pleading and the procedure followed by Mark Sandman was not entirely conventional.

[136] The evidence excluded from consideration by the Court of Appeal comprised five affidavits filed in Protection of Personal and Property Rights Act 1988 proceedings, which were initially brought in the Family Court and later transferred into the High Court. It seems Mark Sandman assumed that the file relating to that

---

114 Compare the reasons given by Glazebrook J above at [81] who thinks the approach "arguable". In *Knox v Till*, the issue was the rather different one of whether solicitors owe duties of care to ascertain whether a client has testamentary capacity. The Court of Appeal there held that there was insufficient proximity to found a duty of care to take steps to ensure testamentary capacity and to avoid execution if incapacity exists: at [6]. In the subsequent *Public Trustee v Till* [2001] 2 NZLR 508 (HC) at [58], Randerson J held after hearing that the incapacity was not reasonably discoverable by the solicitors. Here however what is in issue is the duties owed by a solicitor who knows that a client lacks testamentary capacity.

115 CA judgment at [89]–[90].

proceeding would be available in this claim and that the affidavits could be relied on in opposing the summary judgment application.

[137] The Court of Appeal was prepared to admit the two affidavits filed by Mark Sandman himself in the Family Court proceedings (one of which annexed medical records and correspondence relating to his mother's capacity),[116] although it did not seem to consider that the affidavits bore on what it thought to be the critical question of the firm's dishonesty.[117] The Court was not however prepared to admit the affidavits of other deponents which had been filed in the Protection of Personal and Property Rights Act case.[118]

[138] Some of the excluded material is not relevant to the present claim, being concerned with matters relevant to the Family Court proceedings but not to the action against Wilson McKay. Two of the affidavits however were concerned with Elizabeth Sandman's capacity and how her impairment was apparent. They were made by long-standing family friends who said they visited Elizabeth Sandman regularly.

[139] One, who had known Elizabeth Sandman for more than 20 years, said that "[i]t was readily apparent to me and anyone visiting her that Liz had dementia from at least the beginning of 2010". This deponent said that Victoria Sandman had advised him of her own fatal illness when it was diagnosed in September 2010 and had asked him not to disclose it to her mother because she feared that, with Elizabeth Sandman's dementia, her mother would not understand it or cope with the knowledge. He said that he had visited Elizabeth Sandman on the afternoon she signed the new will and the new enduring powers of attorney. It was his opinion from what she said that Elizabeth Sandman had "no idea" why the lawyers had come to see her:

> My observation was that Liz had no knowledge that she had signed a new will or any Powers of Attorney, and was not in a position to understand the nature and effect of those documents. In my view, Liz was strongly affected by dementia in December 2010, especially compared to the woman I knew and had visited over the last 20 years.

---

116 CA judgment at [35].
117 CA judgment at [65].
118 CA judgment at [35].

[140] Another friend deposed that he, too, was warned by Victoria Sandman not to mention her illness to her mother. He considered from his own observations that Elizabeth Sandman was "suffering dementia, and had no real understanding of her own affairs" and that as at December 2010 she "did not have capacity to understand what she was doing".

[141] These statements were treated as inadmissible hearsay because they were contained in affidavits filed in the separate Protection of Personal and Property Rights Act proceedings in the Family Court and had been simply annexed by Mark Sandman to his own second affidavit opposing the summary judgment application. Of them, the Court of Appeal said simply that it was "not persuaded that the affidavits of other persons in another proceeding should be admitted under s 18 of the Evidence Act 2006".[119]

[142] Section 18(1) of the Evidence Act permits the admission of hearsay statements if:

> (a) the circumstances relating to the statement provide reasonable assurance that the statement is reliable; and
>
> (b) either—
>
> (i) the maker of the statement is unavailable as a witness; or
>
> (ii) the Judge considers that undue expense or delay would be caused if the maker of the statement were required to be a witness.

[143] The Court of Appeal did not make it clear whether it regarded the statements in the affidavits as lacking reasonable assurance of reliability or whether it considered that the makers of the statements should have provided affidavits in the current proceedings and that undue expense or delay would not be caused by that course. It seems unlikely that the Court could have taken the view that the circumstances surrounding the making of the statements did not provide reasonable assurance of their reliability when they were made on oath for the purposes of court proceedings. The

---

[119] CA judgment at [35].

Court did not consider whether the context of summary judgment bore on the assessment of whether requiring new affidavits would cause undue expense or delay.

[144] There is some substantiation of the impressions of Elizabeth Sandman's impairment in these excluded affidavits in other evidence. Mark Sandman's affidavits in the Family Court which were not excluded bear on this question (although they were not referred to by the Court of Appeal which seems to have treated them as not relevant to what it thought was the critical issue of the firm's honesty). In the first affidavit, Mark Sandman says his mother was exhibiting clear signs of dementia and impaired mental function by June 2010. He wrote to Ms Paul in October 2010 about his perception of his mother's dementia and what he considered to be her irrational behaviour towards him.

[145] Further support for these impressions of impairment may be obtained from the medical and nursing records attached to Mark Sandman's second affidavit in the Family Court proceedings. They indicate that Elizabeth Sandman had shown some confusion and anxiety from August 2009 and they identify a background of dementia, although it is generally described as "early" or "mild". From mid-2010 Elizabeth Sandman was either in hospital or nursing care until she returned to her own apartment at the end of September. The plan put in place for Elizabeth Sandman's return to her unit at the end of September 2010 was for the Royal District Nursing Service to provide "twice daily visits for showering, breakfast set up, medication supervision, and assistance to bed", and for a privately engaged caregiver to be with Elizabeth Sandman for 3 hours a day Monday to Friday. Her evening meal was supplied by the Village.

[146] The evidence of Elizabeth Sandman's apparent cognitive impairment in the two excluded affidavits was from lay people, but it has some support in the contemporary medical and nursing record. These affidavits were evidence I consider should have been admitted. They were relevant to Elizabeth Sandman's testamentary capacity and dependency and how apparent they might have been.

Was summary judgment available on the facts?

[147] The statement of claim pleads that Elizabeth Sandman's will was made without testamentary capacity and under the undue influence of Victoria Sandman and Robert Giboney. It is said that the firm "knowingly assisted Vicky and/or the first named First Defendant [to] obtain control of the affairs of the deceased". In particular, it assisted in the execution of a will that "effected Vicky's own intentions".

[148] Elizabeth Sandman's lack of capacity and the influence over her is pleaded to be "evidenced by" a number of matters. They include the surrender of control over Elizabeth Sandman's affairs to her daughter and to Mr Giboney, and medical assessments indicating cognitive impairment.[120] The knowledge of the firm is particularised by the actions it took and the manner in which it communicated with Elizabeth Sandman through Victoria Sandman or Robert Giboney.

[149] If lack of testamentary capacity and undue influence are established, the liability of the firm seems likely to turn on its knowledge of Elizabeth Sandman's impairment and the extent to which she retained freedom of choice in making her will. The evidence available on these matters on the summary application has been set out in the reasons given by Glazebrook J. I comment on aspects of the history but do not repeat it.

[150] In reaching the conclusion of fact that no dishonest purpose of the firm could be established at trial, the Court of Appeal relied almost entirely on an affidavit of Ms Paul, the staff solicitor who attended to the preparation of the will for the firm, together with the material it annexed. It considered that none of the other evidence "provided any basis for the allegation of dishonest assistance".[121] The Court itself referred to no other evidence which might bear on the knowledge with which the firm acted.

[151] The annexures to Ms Paul's affidavit included correspondence in which Ms Paul recorded the instructions she had received and provided advice. Also annexed

---

120 The dependency on Victoria Sandman is remarked on by the medical professionals throughout 2010.

121 CA judgment at [89].

was a certificate of testamentary capacity by Dr Buckley, Elizabeth Sandman's doctor of eight years. The annexures also included the enduring powers of attorney given at the time the will was executed in which an independent solicitor who attended to their execution, Mr Mellet, certified in accordance with the requirements of s 94A of the Protection of Personal and Property Rights Act that he had no reason to doubt Elizabeth Sandman's capacity. Ms Paul herself deposed as to her opinion that Elizabeth Sandman had testamentary capacity and was not acting under the influence of Victoria Sandman.

[152] The Court of Appeal acknowledged that Ms Paul had not been cross-examined, but considered the issue was whether the firm's conduct "was honest when measured by an objective standard" and that "all the points of criticism have been aired and satisfactorily answered" (in apparent reference to its consideration that Ms Paul had undertaken the steps to be expected of a legal adviser).[122] It concluded that "[v]iewed realistically the allegation of dishonesty is without merit".[123]

[153] Other evidence (such as the nursing notes, the excluded affidavits, and Mark Sandman's own observations contained in his affidavit) potentially bore on Ms Paul's understanding of Elizabeth Sandman's capacity and any undue influence to which she was subject. The absence of effective ability on summary procedure to test Ms Paul's knowledge was not in my view sufficiently answered by pointing to the fact that want of probity for accessory liability is objectively assessed, as the Court of Appeal seems to suggest. Although assessment is objective (and does not turn on any individual and subjective register of morality),[124] critical context for the assessment includes the knowledge held by the firm which may be inferred from all the circumstances. They include how Elizabeth Sandman's functioning was perceived by others. Importantly, they also include what knowledge the firm had, directly or through Victoria Sandman or Robert and Leigh Giboney, of the medical and nursing information about Elizabeth Sandman throughout 2010.

---

122 At [92].
123 At [91].
124 *Royal Brunei Airlines Sdn Bhd v Tan* at 389; and *Barlow Clowes International Ltd (in liq) v Eurotrust International Ltd* at [10].

[154] The evidence already assembled for the purposes of the summary hearing indicates that the claims of lack of testamentary capacity and undue influence are not "plainly spurious or contrived".[125] That is not to express a view on whether the evidence would ultimately be found to be compelling. But at trial the parties would have full opportunity to put up all evidence and after discovery. On summary procedure, it cannot be assumed that all contemporary documents are before the court. (There are, for example, no file notes available of the firm's attendances.) At trial, there would be the opportunity to examine both expert and direct witnesses of Elizabeth Sandman's competency who may not have been reasonably available to the plaintiff for the purposes of obtaining affidavit evidence. There would be opportunity to test the reasons for the opinions given by those who provided certificates of Elizabeth Sandman's testamentary capacity.

[155] The certificates provided by Dr Buckley and Mr Mellett represent a significant evidential hurdle to Mark Sandman's allegations of lack of testamentary capacity. I do not think, however, they can be treated as conclusive of the fact of testamentary capacity at this stage of the proceeding. They have not been tested, as they would be at trial. Dr Buckley's certificate was made on the basis of a consultation two months before the will was entered into. Neither it nor Mr Mellet's certificate is explained by reference to any contemporary steps taken to assess competency. Mr Mellet may well have relied on Dr Buckley's certificate, which had been sent to him before the consultation. At trial, it may be quite appropriate to reason that there has been no explanation for deterioration in Elizabeth Sandman's condition (such as might be caused by intervening illness) between the time Dr Buckley saw her and the time the will was made, as Glazebrook J reasons at [85]. But that is not the sort of speculation that strikes me as fairly available on summary procedure, especially in matters of fact which depend on assessment or questions of degree.

[156] Even if accepted at the substantive hearing as establishing testamentary capacity, the certificates themselves are not determinative of undue influence. It is not necessary for a person said to have unduly influenced a testamentary or other disposition of property to benefit personally. Elizabeth Sandman's living

---

[125] See CA judgment at [30]; *Eng Mee Yong v Letchumanan* [1980] AC 331 (PC) at 341; and *Pemberton v Chappell* [1987] 1 NZLR 1 (CA) at 4.

arrangements, reliance on Victoria Sandman and Mr Giboney (a dependency remarked upon by the health professionals who assessed Elizabeth Sandman), and her recorded cognitive impairment are all evidence of vulnerability and reliance, conditions in which undue influence often arises and from which it is sometimes presumed.

[157] The arrangements made for communications from and to Elizabeth Sandman's lawyers and medical professionals to be made through Victoria Sandman, Robert Giboney, or Leigh Giboney may in the end be explained, as Ms Paul explains them, as arrangements which were sensible because of Elizabeth Sandman's deafness or because of her wish to keep her correspondence from being seen by Mark Sandman. But opportunity to test those explanations should be available to the plaintiff. The evidence may also be consistent with loss of control.

[158] There are indications on the materials of fluctuating impairment and periods of confusion on the part of Elizabeth Sandman. The letter written by Ms Paul to Robert Giboney on 1 December 2011, referred to by Glazebrook J at [30], indicates as much. It reports Elizabeth Sandman to be "a lot more alert than previously". Significantly, it also indicates that Elizabeth Sandman did not appear to recollect the dispositions she had made in her will of December 2010 or that they had been made to cover the position in the event of Victoria Sandman's death. It is not clear on the current state of the evidence what information Ms Paul may have received about Elizabeth Sandman's circumstances which is not directly referred to in her own correspondence.

[159] It also strikes me as unsafe to speculate that the fact that Elizabeth Sandman remained living "independently" in her apartment supports an appearance of testamentary capacity and lack of undue influence. At trial it might be expected that direct evidence about the extent of Elizabeth Sandman's independence would be obtained from witnesses who might not be readily available to a plaintiff on summary application, such as the caregivers or the administrator at the Village. It is clear from the materials before the Court that concerns about Elizabeth Sandman's cognitive impairment had been raised throughout 2010, and predated her breaking her femur and requiring hospitalisation in July 2010. That Ms Paul was aware of a background of

some impairment of Elizabeth Sandman's capacity generally appears from the letter she wrote to Elizabeth Sandman on 4 February 2010.[126]

[160] It also appears from the assessments made before Elizabeth Sandman was returned to living in her apartment, with the considerable assistance referred to at [145], that assessment of her cognitive impairment was a focus of the investigation undertaken. Ms Paul's letter of 1 September 2010 indicates that she was aware of the doubts about Elizabeth Sandman's ability to resume living in her apartment and suggests she was informed about the investigation and the caregiving arrangements. Ms Paul suggests in her affidavit that the extensive use of caregivers which allowed Elizabeth Sandman to stay in her unit was because of mobility issues, not cognitive impairment. That is a matter which cannot be resolved on summary assessment. No doubt there were mobility issues too but the assessment which cleared the way for Elizabeth Sandman's return to her apartment pointed as well to concern about cognitive impairment. Whether Ms Paul was informed of the assessment made by the gerontology nurse in mid-September (that Elizabeth Sandman's "mini-mental state" examination score was 19/30 and that she had become institutionalised)[127] is not known on the evidence available. It is a matter upon which there would be opportunity for examination at a hearing.

[161] At trial, it could be expected that there would be full consideration of the sequence of events and the role played in obtaining the will by Victoria Sandman, including the evidence of witnesses from whom affidavits on the summary judgment application might not readily have been obtained. It seems clear that the change in the will and the focus on Victoria Sandman's interest in her mother's estate reflected the knowledge that Victoria Sandman was unlikely to outlive her mother. Similar focus is shown in the other significant change from the 2005 will in the removal of a legacy of $200,000 left to Victoria Sandman which was originally to provide her with the equivalent value of the apartment being left to Mark Sandman. Although the terms of

---

126 Referred to in the reasons given by Glazebrook J at [8] above. The medical notes provided in Mark Sandman's affidavit indicate that in February 2010 Elizabeth Sandman was referred to the Mental Health Service for Older People (MHSOP) for assessment by Dr Buckley for anxiety and depression. There is a notation on the notes of an indication of early dementia. It seems not unlikely that Ms Paul's letter of 4 February was written in the knowledge that a referral for assessment was to be made.

127 See the reasons given by Glazebrook J at [12], n 7.

the 2010 will are explained in the statutory declaration, they represent a departure from Elizabeth Sandman's previous intention to benefit only her children in her testamentary dispositions. (Elizabeth Sandman's indication at the beginning of 2010 that she might change her will was directed at achieving equality between them.) There are also indications, including in correspondence from the firm,[128] of some family strain, although Elizabeth Sandman herself in her lifetime seems to have been concerned to ensure that Mark Sandman was "looked after", as appears from Ms Paul's letter of 1 December 2011.[129]

[162] I mention these matters not to indicate any view as to whether they would be of significance at trial but because they are indicative of context which prompts caution on summary determination. Summary judgment is inappropriate where there are disputed issues of material fact. Here, it seems to me that there is dispute which cannot be determined without hearing and which was unsuitable for summary judgment on the application of the firm. I would allow the appeal against entry of summary judgment.

Strike out of claim for accessory liability

[163] It is not settled on the authorities whether accessory liability arises on the basis of breach of fiduciary duties or whether it is confined to claims by beneficiaries of trusts where trust property has been disposed of in breach of trust.[130] I agree with other members of the Court that it would not be appropriate to strike the claim out on the basis that no trust or trust property is claimed to be affected.[131] Further consideration of the scope of accessory liability for participation in breach of equitable obligations should be undertaken on the basis of particular facts, not pleadings. So, for the purposes of strike-out, it is appropriate to proceed on the assumption that participation in a breach of fiduciary duty is sufficient foundation for a claim of dishonest assistance.

---

128 See the letter sent by Ms Paul to Mark Sandman on 5 November 2011 referred to in the reasons given by Glazebrook J at [22] above. The letter seems to have been written at least partly on behalf of Victoria Sandman.

129 Referred to in the reasons given by Glazebrook J at [30] above.

130 See *Brown v Bennett* [1999] BCC 525 (CA) at 531–533; *Burmeister v O'Brien* (2009) 12 TCLR 539 (HC) at [96]; and *Novoship (UK) Ltd v Mikhaylyuk* [2014] EWCA Civ 908, [2015] QB 499 at [87]–[93].

131 See the reasons given by Glazebrook J at [100](a), n 67.

[164] I consider that the statement of claim sufficiently pleads a relationship of confidence between Elizabeth Sandman on the one hand and Victoria Sandman and Robert Giboney on the other. It also pleads Elizabeth Sandman's dependency and impairment. In relation to Wilson McKay, it pleads that Elizabeth Sandman and Robert Giboney were "knowingly assisted" by Wilson McKay in "[obtaining] control of the affairs of the deceased, and in particular the execution of a will" despite Elizabeth Sandman's testamentary incapacity, that "effected Vicky's own intentions regarding the disposition of the estate of the deceased". In my view, that is sufficient pleading of participation in the procurement of the will in breach of equitable duties owed on the facts pleaded.

[165] It should be noted that the statement of claim does not suggest that the fiduciary responsibilities of Victoria Sandman and Robert Giboney arose under the enduring powers of attorney. The enduring powers of attorney are rather pleaded as part of the facts from which dependency and confidence can be inferred. This pleading is sufficient to raise the elements of breach of fiduciary duty in which Wilson McKay is said to have participated.

[166] As has been indicated, if dishonesty on the part of Wilson McKay is required (a matter on which I have expressed some doubt in circumstances where the firm itself owed duties to Elizabeth Sandman), I consider it is sufficiently pleaded by the assertion that the firm had knowledge of Elizabeth Sandman's testamentary incapacity and the undue influence she was under in making her will. I consider the pleading is sufficient to raise dishonest participation.

[167] The last element required for accessory liability is that the plaintiff is someone who is affected by the breach of duty or trust either as a beneficiary of the trust or someone who benefits from the proper performance of the fiduciary duty.[132] Mark Sandman says he qualifies because he is a beneficiary under the 2005 will. I do not accept that to be sufficient interest.

---

[132] Lynton Tucker, Nicholas Le Poidevin and James Brightwell (eds) *Lewin on Trusts* (19th ed, Sweet & Maxwell, London, 2015) at [39-071] and [40-024]; and *Bawany v Royal Bank of Scotland International Ltd* [2018] EWHC 2248 (Ch) at [47]–[48]. See also CA judgment at [24].

[168] I consider the respondent was right in the submission that accessory liability could be claimed by Mark Sandman against the firm only if those alleged to be primarily responsible, Victoria Sandman and Robert Giboney, were trustees of a trust in which he was a beneficiary or owed Elizabeth Sandman fiduciary duties through which he benefited. His potential expectation through Elizabeth Sandman's 2005 will, a testamentary disposition she was free to change, is insufficient interest for a claim for accessory liability.

[169] As explained in *Royal Brunei Airlines v Tan*, accessory liability for breach of trust fills the gap that arises where deliberate participation by a third party in a breach of trust does not lead to receipt of trust property.[133] Where the third parties act for or deal with dishonest trustees, the trustees themselves will have no claim against the third parties. Without accessory liability, nor would those beneficiaries who suffer loss as a result, perhaps because the trustees are not able to make amends. The policy served by accessory liability is "the dual purpose of making good the beneficiary's loss should the trustee lack financial means and imposing a liability which will discourage others from behaving in a similar fashion".[134] Such liability is "fault-based" and the preponderance of authority requires dishonesty by the third party.[135]

[170] No comparable gap exists in relation to a beneficiary under a will to whom a third party owes duties of care on the principles established in tort. If the beneficiary does not qualify under those principles, it is because the third party does not owe him a duty of care. As already indicated, Mark Sandman has not brought a claim that Wilson McKay owed him a direct duty of care.

[171] As Lord Nicholls explained in *Royal Brunei Airlines v Tan*, third parties who are engaged to act for trustees will usually be accountable to the trustees if they fail to act with reasonable care and skill.[136] Similarly, third parties who are engaged to act for a testator will usually be accountable to the testator or the estate if they fail to act with reasonable care and skill. These liabilities can in suitable cases be enforced by

---

133 See *Royal Brunei Airlines Sdn Bhd v Tan* at 382.
134 *Royal Brunei Airlines Sbn Bhd v Tan* at 387.
135 See above at [128].
136 *Royal Brunei Airlines Sdn Bhd v Tan* at 391.

the beneficiaries of a trust or the beneficiaries of the estate if the trustees or executors are unable or unwilling to act. Against this background of remedies, there is no occasion to expand the ability to recover from accessories for those who are not beneficiaries of a trust or fiduciary duty breached by the trustees or fiduciaries primarily responsible.

[172] Mark Sandman could claim against the firm for accessory liability only if he was a beneficiary under a trust or in respect of a fiduciary obligation owed to him by Victoria Sandman or Robert Giboney. I consider Wilson McKay was right in the submission that Mark Sandman's potential expectation as a beneficiary under the 2005 will did not qualify him to bring the accessory claim against it. I would therefore strike out the claim for accessory liability.

Solicitors:
Queen City Law, Auckland for Appellant
McElroys, Auckland for Respondents