Supreme Court of New Zealand
Te Kōti Mana Nui

16 APRIL 2019

MEDIA RELEASE – FOR IMMEDIATE PUBLICATION

MARK ROBERT SANDMAN V COLIN CHARLES MCKAY, ROGER DAVID CANN AND DAVID JOHN CLARK (AS PARTNERS OF WILSON MCKAY).

(SC 35/2018) [2019] NZSC 41

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest www.courtsofnz.govt.nz

On 2 December 2010 Mark Sandman's mother, Mrs Elizabeth Sandman, executed a will. She died on 30 October 2013 and her estate was distributed in 2014 in accordance with that will.

Under the 2010 will Mark Sandman was left the apartment that he occupied. There were a number of other minor bequests. The residual estate was divided equally between Mrs Sandman's two children: Mark Sandman and his sister, Victoria Sandman. Should either of the residuary beneficiaries predecease Mrs Sandman, the share that child would have taken was, absent issue (children), to be divided among certain relatives and friends of Mrs Sandman.

Victoria Sandman predeceased Mrs Sandman. She had no issue. Under an earlier will executed in 2005, Victoria's share of the residuary estate would have gone to Mark Sandman rather than to Mrs Sandman's relatives and friends in accordance with the 2010 will.

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Before Mrs Sandman executed the 2010 will on 28 October 2010 her doctor certified that Mrs Sandman had the mental capacity to understand she was making a will and disposing of her assets. The doctor last saw Mrs Sandman on 30 September 2010. At the same time Mrs Sandman executed the 2010 will, she executed two enduring powers of attorney in favour of Victoria (in relation to property and welfare). Before she executed these, as required by statute, an independent solicitor certified that he had "no reason to suspect that [Mrs Sandman] was or may have been mentally incapable at the time she signed the enduring power of attorney" forms.

In November 2016 Mark Sandman filed a claim in the High Court alleging that Mrs Sandman lacked testamentary capacity when she executed the 2010 will. It was further alleged that, because Mrs Sandman lacked capacity, the 2010 will reflected the wishes of her daughter, Victoria, and of Mr Giboney, one of the executors, rather than Mrs Sandman's wishes.

It was also alleged that Wilson McKay, Mrs Sandman's solicitors and the Respondents, had dishonestly assisted Victoria Sandman and Mr Giboney. Damages were sought for the difference between what Mark Sandman received under the 2010 will and what he would have received under the 2005 will.

Wilson McKay applied to strike out the claim against it and for summary judgment. These applications failed in the High Court. On appeal, the Court of Appeal granted Wilson McKay's application for summary judgment.

This Court granted leave to appeal, the approved question being whether the Court of Appeal erred in granting summary judgment.

The majority of the Supreme Court, comprised of Justices Glazebrook, O'Regan, Ellen France and Arnold, said it was arguable that solicitors would be obliged to follow the instructions of their client to draft a will and have it executed, even if they had doubts about testamentary capacity. The majority was, however, content to decide the appeal on the basis that, if Wilson McKay knew that Mrs Sandman

lacked testamentary capacity or was wilfully blind, then this would constitute dishonest assistance.

The majority held, on the basis of the contemporary documentation, that Mr Mark Sandman could not succeed at trial in proving that Wilson McKay either knew that Mrs Sandman lacked testamentary capacity or was wilfully blind. The majority noted that, to succeed at trial, Mark Sandman would need to impugn not only Wilson McKay's contemporary documentation, but also that of the doctor certifying testamentary capacity and of the independent solicitor certifying the enduring powers of attorney. No reasons were suggested why these professionals would risk their careers by falsifying records.

The majority therefore held that the Court of Appeal was correct to grant summary judgment in favour of Wilson McKay. The majority also held that the firm would have had a strong case for strike-out.

Chief Justice Elias, in dissent, would have set aside the summary judgment entered for Wilson McKay. She considered that the questions of fact concerning testamentary capacity and the firm's knowledge of it and any undue influence were unsuitable for determination on summary application. Chief Justice Elias would, however, have struck out Mark Sandman's claim alleging dishonest assistance on the basis that Mark Sandman was not a beneficiary of any trust and no fiduciary duty was owed to him.

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