Caveat Solicitor

Donal Griffin *and* ***Jayne Nah*** *LEGACY LAW*

The recent decision of *Calvert v Badenach*[1] is instructive for lawyers throughout Australia.

Mr Doddridge had one daughter, who was 3 years old at the time of Mr Doddridge's divorce from her mother. Mr Doddridge subsequently had no involvement in his daughter's life. Mr Doddridge later met Mrs Calvert, Mr Calvert's mother, and Mr Doddridge lived with Mrs Calvert until her death in 2006. Mr Calvert first met Mr Doddridge in 1976; they formed a close relationship where they later worked together and pursued recreational activities together. In essence, Mr Doddridge was like a step-father to Mr Calvert.

Mr Badenach was a partner in a Tasmanian firm that acted for Mr Doddridge for a number of years. Mr Doddridge, in 1984 through the same law firm, had executed a will which gave a gift of $10,000 to his long estranged daughter but in his final will, this gift was not included.

In giving his instructions to Mr Badenach, Mr Doddridge said that he and Mr Calvert purchased two pieces of real estate which were owned as tenants in common. Mr Doddridge made it clear that he wanted all his estate, including these properties, to go to Mr Calvert.

Mr Doddridge, at the time of his death, held a half interest in each of the two properties. The grant of probate for Mr Doddridge was issued in 2010. Subsequently, Mr Doddridge's estranged daughter made an application under the Testators Family Maintenance Act 1912 (TFM). The Supreme Court awarded her $200,000 and stated that "[had] it not been for the significance of Mr Calvert's claim on the testator, I would have made greater provision".[2] As a result, the net value of the estate which Mr Calvert received was reduced.

Mr Calvert commenced action against Mr Badenach for breach of duty of care by failing to ensure that Mr Doddridge's instructions were given effect when the will was drafted. The trial judge in coming to his decision acknowledged that:[3]

> … when a solicitor is instructed to act on the making of a will, that solicitor will owe an intended beneficiary a duty to take reasonable care to give effect to the client's testamentary wishes.

In this case, the trial judge accepted that the solicitor:[4]

> … owed his client a duty to enquire as to the existence of any family members who could make a claim under the TFM Act, with a view to the testator's reasons for making no provision for them possibly being included in the will.

However, he went on to state that "[t]here is no evidence that the client had engaged the solicitor to provide advice as to anything other than the making of the will".[5]

The trial judge referred to cases such as *Hill (t/as RF Hill & Associates) v Van Erp*[6] and *Ross v Caunters*[7] and said that the circumstances of the current case were very different:[8]

> It is not alleged that the solicitor was negligent in failing to recommend the severance of a joint tenancy. It is alleged that he was negligent in failing to advise that joint tenancies could be created … This is not a case in which it can be asserted that negligence has resulted in a loss to the estate.

The trial judge considered the evidence about the scope of the retainer, deciding that there was no evidence that Mr Doddridge engaged Mr Badenach to provide advice as to anything other than the making of a will. He concluded that the solicitor did not owe a duty to Mr Doddridge nor Mr Calvert to "provide advice about creating joint tenancies in the absence of such an enquiry".[9]

The Supreme Court of Tasmania, on appeal, overturned the decision of the trial judge. The court was of the view there was a duty of care owed by the solicitor to the beneficiary and that duty was breached. The court stated that the nature and the extent of the duty was interpreted too narrowly by the trial judge.

The court referred to the judgment of Brennan J in *Hill v Van Erp* who stated:[10]

> Most testators seek the assistance of a solicitor to make their intentions effective. The very purpose of a testator's retaining of a solicitor is to ensure that the testator's instructions to make a testamentary gift to a beneficiary results in the beneficiary's taking that gift on the death of the testator. There is no reason to refrain from imposing on a solicitor who is contractually bound to the testator to perform with reasonable care the work for which he has been retained a duty of care in tort to those who may foreseeably be damaged by carelessness in performing the work.
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> …
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> By accepting the testator's retainer, the solicitor enters upon the task of effecting compliance with the formalities necessary to transfer property from a testator on death to an intended beneficiary.

The Supreme Court seems to be in agreement with the Full Court's discussion in *Doolan v Renkon Pty Ltd*[11] and quoted:[12]

> … the precise scope of that duty will depend *inter alia* upon the extent to which the client appears to need advice. An inexperienced client will need and be entitled to expect a solicitor to take a much broader view of the scope of his retainer and his duties than will be the case with an experienced client.

The court stated:[13]

> [w]hat can be distilled from the discussion in *Renkon* is that, in determining the scope of a solicitor's duty of care to a client in contract, some regard should be paid to the particular client …

Given the difference in the parties' experience of TFM claims and with the testator's consistent and clear instruction to leave his entire estate, including the two properties, to Mr Calvert, who was not related by blood:[14]

> … the duty of care owed by the respondents to the testator was much more extensive than that which the learned trial judge set out. The first respondent owed a duty of care to the testator to, not only enquire of him whether he had any children, but also to advise him why that enquiry was being made, the potential for a TFM claim, the impact that could have on his expressed wishes and of possible steps he could consider to avoid that impact.

The court was of the view that the solicitor's duty or his scope of engagement was not dependent upon being satisfied on the balance of probability that the testator would or would not have acted if he was advised on the possible TFM claim. A solicitor's duty is fulfilled by providing all the possible steps a will-maker can take to achieve his or her wishes so that the will-maker is provided with the opportunity to make an informed decision.

On the point of whether there was a duty owed by the solicitor to the beneficiary, the court stated "[i]t is uncontroversial that a solicitor preparing a will has a duty to intended beneficiaries to give proper effect to the testator's intentions".[15] The court also noted "[a]ny duty owed to a beneficiary cannot conflict with that owed to the testator"[16] and in the current case "[t]he scope of the duty to the beneficiary postulated by the appellant …is consistent and coextensive with that owed to the testator".[17] The court concluded there was a breach of duty that was owed by the solicitor to the testator and in this case it also "extended" to the beneficiary.

In our experience, clients are often mistaken as to how they own property with the result that precise instructions can be difficult to obtain at a first meeting. We respectfully suggest that a search by an independent third party should be done in each case. The court referred to a New Zealand case called *Woods v Legal Complaint Review Officer*.[18] This case was a disciplinary proceeding for unprofessional misconduct involving a solicitor who drafted a will for a terminally ill client. The client told the solicitor she believed her house was owned either jointly with her husband or possibly under her husband's name only. She wanted the residue of her estate to go to her son as the house was assumed to go to her husband. She told the solicitor she did not want the solicitor to check the title on the house and accordingly the solicitor did no search on the ownership of the house before the signing of the will. It was later discovered that the house was held as tenants in common and as a result, her half share of the house fell into residue of her estate which meant that it went to their son instead of her husband.

The Legal Complaint Review Officer held that, despite the fact that the client stated that she did not want the solicitor to carry out the title search on her house, the solicitor's conduct in failing to check the ownership:[19]

> … fell short of the standard of competence and diligence that a member of the public would be entitled to expect from a reasonably competent lawyer and that it was conduct which would be regarded by lawyers of good standing as being unacceptable.

Donal Griffin
Director
Legacy Law
dgriffin@legacylaw.com.au
www.legacylaw.com.au

Jayne Nah
Director
Legacy Law
jnah@legacylaw.com.au
www.legacylaw.com.au

Footnotes

1. *Calvert v Badenach* [2015] TASFC 8; BC201506850 (24 July 2015).
2. *Doddridge v Badenach* [2011] TASSC 34; BC201105092 at [49].
3. Above, n 1, at [11].
4. Above, n 1, at [13].
5. Above, n 1, at [13].
6. *Hill (t/as RF Hill & Associates) v Van Erp* (1997) 188 CLR 159; BC9700701.
7. *Ross v Caunters* [1980] Ch 297; [1979] 3 All ER 580; [1979] 3 WLR 605.
8. Above, n 1, at [12].
9. Above, n 1, at [13].
10. Above, n 1, at [54].

11. *Doolan v Renkon Pty Ltd* (2011) 21 Tas R 156; [2011] TASFC 4; BC2011069373.
12. Above. n 11, at [36].
13. Above, n 1, at [20].
14. Above, n 1, at [21].
15. Above, n 1, at [49].
16. Above, n 1, at [78].
17. Above, n 1, at [78].
18. *Woods v Legal Complaints Review Officer* [2013] NZHC 674; BC201362848.
19. Para 62 [2015] TASFC 8.