IN THE HIGH COURT OF AUSTRALIA
HOBART REGISTRY

No. H12 of 2015

BETWEEN:

ROBERT BADENACH
First Appellant

and

MURDOCH CLARKE SOLICITORS (A FIRM)
Second Appellant

and

ROGER WAYNE CALVERT
Respondent

RESPONDENT'S SUBMISSIONS

PART I: Suitability for publication

1. The Respondent certifies that this submission is in a form suitable for publication on the internet.

Part II: Issues

2. Whether a solicitor retained by a client to draw a will owes a duty of care to that client to make any enquiries as to facts and circumstances that may impinge upon the effectiveness of the proposed will in achieving the client's testamentary intentions, or whether the solicitor's duty is limited to ensuring compliance with the formalities of will execution and attestation.

3. If the solicitor does have a duty to make such inquiry, whether the solicitor owes a duty of care to the client to give advice arising from the results of that inquiry, as to action that the client might take to give effect to his or her testamentary intention.

4. If the solicitor does have a duty to so advise, whether imposing on a solicitor a duty which extends to the provision of advice as to steps that could be taken to avoid the effect of a successful claim under the *Testators' Family Maintenance Act* 1912 (Tas.) ("the TFM Act") would be contrary to public policy, or lead to incoherence in the law.

5. Whether any duty of care owed to the intended beneficiary is inconsistent with the duty of care owed to the testator/client.

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6. Whether the Full Court of the Supreme Court of Tasmania correctly decided the issue of causation.

Part III: *Judiciary Act 1903*, section 78B

7. It is certified that the Respondent has considered whether notice should be given pursuant to section 78B of the *Judiciary Act 1903* and has formed the view that no such notice is required.

Part IV: Facts

8. The Respondent accepts the Appellants' narrative of facts, but says:
   8.1. He accepts that paragraph 8 is taken from the reasons for judgment in *Doddridge v Badenach* [2011] TASSC 34 rather than being the subject of evidence at the trial;
   8.2. As to paragraph 13, the only evidence as to the instructions for preparation of a lease are contained in the solicitor's file note, and in the draft lease, and required the proposed tenants to pay rates, land tax and insurance as well as the nominal rental;
   8.3. As to paragraph 19, the First Appellant did not give evidence at the trial, so the only evidence as to the advice sought and instructions given by the testator is in the solicitor's file note.

Part V: Applicable constitutional provisions, statutes, and regulations

9. The Appellants' statement of applicable constitutional provisions, statutes, and regulations is accepted.

Part VI: Argument

Grounds 2 and 3: The extent of the duty of care

10. The Appellants contend that they owed no 'extended duty of care' to the Respondent. There are two propositions that must be dealt with in assessing that contention. The first is whether a solicitor, retained to draw a will by which a testator disposes of his or her estate in a particular way, owes any duty to his or her client to do other than ensure that a properly drawn, executed and attested will is produced reflecting the client's instructions. The second is whether a co-extensive duty is owed to the intended beneficiary under the proposed will, that goes beyond ensuring compliance with the formalities of will execution.

11. Each of the four justices that have considered this matter has concluded that the Appellants owed a duty of care to the testator/client to make inquiries, relevantly, as to whether there were any persons who might make a claim under the TFM Act, and thus defeat the testamentary intention of the testator[1]. That is hardly surprising, being reflected in the practice texts referred to by the Chief Justice at first instance[2] and

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1 Blow CJ at [25]; Tennent J at [21]; Porter J at [69] and [72]; Estcourt J at [111], [116]; [120]
2 Blow CJ at [19]

Porter J on appeal[3]. Porter J said at [65] that *'it would be routine for solicitors to give advice about such matters'*.

12. Further, each of the four justices that have considered this matter has accepted that if such an inquiry was made, and the testator disclosed that he had a daughter, for whom no provision had been made in the will, the solicitor owed a duty to the testator to explain the operation of the TFM Act and the effect that a successful claim by the daughter under the TFM Act would have upon his testamentary intention.

13. So much is hardly controversial. There is no good basis for the Appellants' concern (expressed at Outline [38]) about a solicitor who has *'a retainer to draw a simple will'* being required to give *'specific advice which was not sought on matters of estate planning'*. In a number of cases, the duty owed by the solicitor to the client has been described as one to use reasonable care to give effect to the client's testamentary wishes[4]. That may, depending on the circumstances, involve making enquiries, and giving advice. It is certainly more than to merely transcribe instructions given for the preparation of a will, and ensure that it is properly executed.

14. The need to make enquiries and give advice about possible TFM claims is regarded as routine for solicitors who are competent to draft a will, just as a solicitor who is retained to do a 'simple conveyance' may be required to give specific advice which is not explicitly sought by the client about real property, town planning, securities, finance, ownership structures, and taxation issues. For it to be otherwise would *'relegate a solicitor and his obligations comparable to that of a parts counterman or order taker'*.[5]

15. Nor ought there be anything controversial in concluding, as did each of the members of the Full Court, that a coextensive duty of care was owed by the Appellants to the Respondent.

16. *Hill v Van Erp* (1997) 188 CLR 159 quelled the controversy as to whether a solicitor could owe a duty of care to a disappointed beneficiary, who was not his or her client. Whilst the negligence of the solicitor in that case concerned the formalities of execution of the will of the testatrix, the reasons of the majority justices did not circumscribe the duty to one to take reasonable care that the will complied with formal requirements.

17. Brennan CJ held that the duty of care to the proposed beneficiary was one imposed by the law[6]. His Honour said:

> "But the interest of a client who retains a solicitor to carry out the client's testamentary instructions and the interests of an intended beneficiary are coincident.
> 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

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3 Porter J at [65]
4 see, for example, *Fischer v Howe* [2013] NSWC 452; [2014] NSWCA 286
5 *Hickson v Wilhelm* (1998) 2 WWR 522
6 *Hill v Van Erp* at 171

> 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 . . . A breach of the retainer by failing to use reasonable care in carrying the client's instructions into effect is also a breach of the solicitor's duty to an intended beneficiary who thereby suffers foreseeable loss . . . "[7]

18. At p. 170 Brennan CJ said that the case fell to be considered according to the principles of the general law of negligence.

19. Dawson J[8] said:

> "However, in this case nothing would appear to turn upon the nature of the conduct which constituted carelessness on the part of the solicitor."[9]
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> . . .
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> "A client who retains a solicitor to draw up a will and attend to its execution must ordinarily rely upon the solicitor to carry out those functions to effectuate the client's testamentary intentions"[10]
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> . . .
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> "Thus, when a solicitor accepts responsibility for carrying out a client's testamentary intentions, he or she cannot, in my view, be regarded as being devoid of any responsibility to an intended beneficiary. The responsibility is not contractual but arises from the solicitor's undertaking the duty of ensuring that the testator's intention of conferring a benefit upon a beneficiary is realized . . ."[11]

20. Gaudron J said[12] that, in the circumstances of that case, the solicitor was under a duty of care to take reasonable steps to ensure that the testatrix's testamentary intentions were not defeated by s. 15 of the *Succession Act* 1981 (Q.).

21. The Full Court did not frame the duty of care owed by the Appellants to the testator by conflating questions of duty and breach. Indeed Estcourt J at [118]-[119] specifically averted to that vice, by reference to *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 390 at [68] per Hayne J, the same authority referred to by the Appellants.

22. In *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361, French CJ and Gummow J (in dissent as to the result) held at [20]-[21] that what is required is to determine whether there is a duty of care, and if so, its nature and content. The formulated duty *'must neither be so broad as to be devoid of meaningful content, nor so narrow as to obscure the issues required for consideration'*. Avoiding the latter error required asking, even if *'there was some reasonable course of conduct the*

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7 *Hill v Van Erp* at 167
8 with whom Toohey J generally agreed
9 *Hill v Van Erp* at 179
10 *Hill v Van Erp* at 183
11 *Hill v Van Erp* at 185
12 *Hill v Van Erp* at 199

defendant could have engaged in that would have avoided the injury suffered by the plaintiff', whether the plaintiff was under a duty to take that course.

23. French CJ and Gummow J recognised at [22] that ordinarily a solicitor's duty to his or her client may be formulated at a high level of abstraction, merely *'to take reasonable care*', although circumstances may require more detail of its scope and content than that, their Honours having noted at [19] that *'regard can be had to the pleaded negligence before consideration is given to the scope and content of a duty'*. Gleeson CJ recognised (in a passage cited by the Appellants at [34]) that *'The kind of damage suffered is relevant to the existence and nature of the duty of care upon which reliance is placed'*.[13]

24. The Full Court formulated the content of the duty of care appropriately to the circumstances of this case. The 'reasonable care to give effect to the client's testamentary wishes' was to make inquiry, and to give advice[14]. The trial judge had also accepted that the duty of care required inquiry and advice[15].

25. It should not be overlooked that this is not a case where there is debate about the adequacy or sufficiency of the inquiry or the advice given. This is a case in which there was admittedly no inquiry and no advice. The Appellants seek to justify their inaction by *ex post facto* raising reasons why it was justifiable not to make any inquiry or give any advice. However, on examination each of those reasons is unsupportable.

26. It should also not be overlooked that it was no part of the Respondent's case that the Appellants had a duty to advise him, nor to look after or protect his economic interests. Nor was it the Respondent's case that the solicitor had to 'persuade' his client to take a certain course or ensure that his advice was accepted and acted upon[16].

27. At times the Appellants' submissions, in analysing whether a duty was owed by the solicitor to the intended beneficiary, descend into a contest between the Respondent and the testator's daughter as to whose interests the solicitors (and the Courts below) ought to have preferred. In doing so, the Appellants point to some perceived moral justification for what transpired in this case. That overlooks the critical analysis of the solicitor's conduct viz a vis his client.

28. There is no doubt that the solicitor did not owe any duty of care to the testator's daughter. Any duty owed to the Respondent must be co-extensive with the duty to the testator/client[17]. Once it is concluded that, in accordance with principle, the solicitor owed his client a duty of care that required the making of inquiry and the giving of advice, one must then ask whether that same duty was owed to the Respondent, who was the only person capable of suffering loss if the solicitor did not fulfil his duty to his client.

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13 *Cole v South Tweed Heads Rugby League Football Club Limited* (2004) 217 CLR 469 at [1]
14 Tennent J at [21]; Porter J at [49], [69], [72]; Estcourt at [111], [116], [120]
15 Blow CJ at [25]
16 Tennent J at [18]
17 Which the members of the Full Court found was the case: Tennent J at [22]; Porter J at [83]; Estcourt J at [117]

29. The content of the duty of care formulated by the members of the Full Court is entirely consistent with that found in *Hill v Van Erp*[18].

30. A will that is prepared in negligent ignorance of a possible TFM claimant may not be capable of giving effect to the testator's testamentary intention just as much as a will improperly executed. None of the authorities cited by the Appellants at [37] are an obstacle to a duty of care existing as found in this case. It is worth making brief observations about each of them.

31. *Miller v Cooney* [2004] NSWCA 380 turned on its own facts, namely that the solicitor was instructed merely to change the beneficiaries in a previous will, which had clearly been drawn by a solicitor, and who had no reason to believe that the testator was not the sole registered proprietor of the relevant property, but rather co-owned the properties as a joint tenant.

32. In *Vagg v McPhee* (2013) 85 NSWLR 154 the decision was based primarily on the conclusion that the estate had a claim against the solicitor, and therefore there was no need for the beneficiary to bring a claim (and in those circumstances no need to find any duty owed to that beneficiary). It was also clear on the facts as found that the testator did not want to sever the joint tenancy; her wish was for her husband to sell the whole property and distribute the proceeds amongst their children, so the solicitor had no duty to advise about severing the joint tenancy.

33. The Appellants do not argue that a claim could have been made by the estate in the present case. Whilst such an argument was advanced at first instance it was correctly rejected by the trial judge, and was not persisted with on appeal.

34. *Worby v Rosser* [2000] PNLR 140 is another example of the Court denying a duty where the estate had a claim against the solicitor. The Court of Appeal also held that no duty was owed to beneficiaries under a previous will in circumstances where a subsequent will was challenged for lack of capacity.

35. *Worby* was applied in Canada in *Graham v Bonnycastle* (2004) 243 DLR (4th) 617. The majority in *Graham* also relied on the proposition that no duty could be owed to beneficiaries under an earlier will because it would give rise to a conflict of interest with the solicitor's duty to the testator in preparing subsequent wills. Similarly, in *Clarke v Bruce Lance & Co (A Firm)* [1988] 1 WLR 881 there was an obvious conflict of interest between the interests of the plaintiff beneficiary, and the testator who had instructed the defendant to enter into an *inter vivos* transaction involving a property he had previously devised to the beneficiary.

36. *Queensland Art Gallery Board of Trustees v Henderson Trout* [2000] QCA 93 was decided on the basis that no loss was caused because the testatrix had not finally made up her mind during the period when the defendant firm was asked to prepare various drafts of her will, and then died unexpectedly soon after terminating the defendant's retainer and engaging new solicitors.

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[18] per Estcourt at [155]

37. *Sutherland v Public Trustee* [1980] 2 NZLR 536 in fact assists the Respondent in the present case, as being an example of what a prudent solicitor should do. The testator was specifically warned that if his wife, his sole beneficiary, predeceased him his estate would pass on intestacy however the testator refused to nominate beneficiaries under a gift over. His lack of testamentary intention to benefit his step-children meant there could not be a duty of care owed to them. The drafter of the will questioned the testator about whether he had any dependents other than his wife (at 541) and his contemporaneous file note recorded that the testator had been advised about the TFM legislation (at 540). An experienced estates solicitor gave expert evidence that the matters he would concentrate upon in taking instructions in these circumstances included ascertaining all possible dependants (at 542).

38. *Cancer Research Campaign v Ernest Brown & Co* [1988] PNLR 592 also assists the Respondent. Harman J recognised (at 601) that in drafting a will, a solicitor has an obligation to consider the tax implications of the testator's instructions, and (obviously) to give advice about them. His Lordship made no suggestion that the public policy that led to the enactment of death duties legislation would detract in any way from the solicitor's duty to advise about whether exposure to that tax could be minimised. The duty that Harman J refused to impose was one to advise the testator or her beneficiaries about methods of minimising inheritance tax in relation to her brother's estate valued at around £200,000, which the testator had recently inherited at the relevant time.

39. More on point is the decision of the Supreme Court of California in *Heyer v Flaig* 70 Cal 2d 223 (1969) in which the testator's instructions were that she wished to leave all of her estate to her two daughters, and that she intended to re-marry. The will failed to make provision for the prospective husband or expressly show an intention not to make such provision, and accordingly on the testator's death the husband claimed a portion of the estate as a 'post-testamentary spouse' under the Californian Probate Code. The court found (6-1) that the intended beneficiaries were owed a duty of care that was breached because *'a reasonably prudent attorney should appreciate the consequences of a post-testamentary marriage, advise the testator of such consequences, and use good judgment to avoid them if the testator so desires'.*

40. The California Court of Appeal subsequently held that where a lawyer was engaged to structure a couple's estate so as to minimise death duties, and negligently drafted a revocable *inter vivos* trust such that the trust corpus and the wife's estate were reduced by taxes that could otherwise have been avoided, the third party beneficiaries could maintain a cause of action against the lawyer: *Bucquet v Livingston* 57 Cal App 3d 914 (1976).

41. The decision in this case is consistent with the line of authority discussed by Porter J at paras [51]ff.

42. The present case is another *'example of the duty to effectuate the intentions of the testator'*, no different from the duty *'to take steps to advise the testator to alter the joint tenancy'* recognised in a line of authority[19] the Appellants cite at [40]. That the solicitor owed a duty to advise the client in such cases was not regarded as

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19 *Carr-Glynn v Frearsons (a firm)* [1999] Ch 326, *Smeaton v Pattison* [2003] QCA 341, below [2002] QSC 431, *Miller v Cooney* [2004] NSWCA 380, and *Vagg v McPhee* (2013) 85 NSWLR 154

controversial. The content of the duty found in this case, just as in those authorities, *'is closely analogous to "the task of effecting compliance with the formalities necessary to transfer property from a testator on death to an intended beneficiary"'*[20].

43. Importantly the duty contended for by the Respondent (and accepted by the Full Court) does not (as the Appellants assert at [38]) assume that instructions to adjust property rights *inter vivos* will be given, or assume that the testator was willing and able to pay for the cost of implementing those steps. The duty was to make inquiries and give advice, not to ensure that a certain course was followed.

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44. Whether or not the testator would have given instructions to take any steps, and what those steps could have been, and whether the cost of those steps (including any GST or CGT or stamp duty consequences) may have affected whether such instructions were given and the outcome of those instructions, is not relevant to the issues of duty and breach, but rather to the assessment of the Respondent's damages, by reference to the lost chance that arose because no inquiry was made by the solicitor and no advice was given. As Porter J noted at [70] *'The outcomes may be quite different, depending on what, if anything, is done by the testator'*. The calculation of the Respondent's lost chance is not before this Court.

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45. McHugh J in *Hill v Van Erp* said nothing at all about *'the cost consequences of expanded advice'*. His Honour's dissenting judgment expressed concern about the solicitor being liable for $163,471.50 when *'she was probably paid less than $300 [in 1990] for preparing the will'*. It would have cost Mrs Hill and her client nothing for Mrs Hill to have warned that any disposition would be invalidated if that beneficiary or their spouse attested the will. It has never been suggested that a solicitor should not be liable for a negligent conveyance because they are [in 2015] paid only $500. As noted above, the cost consequences for the testator of acting on the advice that the solicitor should have given (whether it be the costs of investigating the circumstances
30 of potential TFM claimants if thought necessary, or the costs of taking steps to protect the will, or the costs of converting the tenancies in common to joint tenancies) are matters to be taken into account when calculating the value of the lost opportunity.

Ground 4: The co-extensive duty of care to the Respondent

46. The Appellants raise a number of 'concerns' arising from the co-extensive nature of the duty of care owed to the Respondent said to militate against the imposition of the duty of care to inquire and advise that, when properly considered, are illusory.

40 47. As stated above, the Respondent accepts that the duty owed to him, as beneficiary, must be co-extensive, and not in conflict, with the duty owed by the solicitor to the testator. This co-extensive duty that was owed both to the testator and the Respondent was a duty to make inquiry, and to give advice to the testator. The solicitor did not owe a duty to the Respondent to give advice to the Respondent.

48. The Respondent accepts what is said in the first sentence of paragraph [45] of the Appellants' outline. So much is obvious. However, it does not follow that the solicitor then had conflicting duties, as the solicitor did not owe a duty (to either his client or

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20 Appellants at [40] quoting Brennan CJ in *Hill v Van Erp* at 170

the Respondent) to advance the economic interests of the Respondent. The solicitor owed a duty to give effect to the testator's testamentary intentions, which in this instance involved a duty to give advice. He failed to give any advice.

49. The solicitor's duty to inquire and advise did not require him to take any steps to convert the ownership of the two properties into joint tenancies, or indeed to take any specific action: cf. Appellants' Outline at [46]. The duty was to enquire and, depending upon the outcome of the enquiries, to advise. If the testator had then instructed the solicitor to take steps to convert the properties to joint tenancies, the solicitor's duty to take those steps (to the extent possible) would have arisen as a result of those instructions, and would be no part of the duty that arose from the instructions to prepare a will leaving all of his property to the Respondent.

50. It was no part of the solicitor's co-extensive duty (cf. Appellants' outline at [47]) to *'tell the non-client beneficiary what the testator had decided'*, explain *'the risk to the beneficiary should he predecease'* [i.e. his share would automatically pass to the testator], or inform the Respondent about the documentation involved and the fact that the Respondent had the right to withhold his consent and prevent the conversion to joint tenancies from taking place. The solicitor would only have had an obligation to raise the matter with the Respondent in the event that the testator instructed him to do so, following the provision of advice about the possibility of a TFM claim, and steps that could be taken to ameliorate the effect of such a claim upon the estate, and as noted previously, the solicitor's duty in that regard would be founded in those instructions, not the initial instructions to draft the will. No conflict arises when considering the duty contended for in this case.

51. If the solicitor had not breached his duty, by failing to make any enquiry, or giving any advice, and had advised the testator of his right to take steps, with the concurrence of the Respondent, to change the ownership of the two properties from a tenancy in common to a joint tenancy, then additional considerations might have arisen. But that is not an argument in support of the solicitor not owing any coextensive duty to the testator and the Respondent to give some advice.

52. At that point, a conflict of interest may have arisen that would have required the solicitor to explain to the Respondent that he needed to obtain independent legal advice; but those questions are irrelevant to the duty in issue in this appeal. Any such independent advice taken by the Respondent about converting the properties to joint tenancies would doubtless have included advice on protecting the Respondent's half share in those properties should he suddenly predecease the testator, such as by insuring his own life for the value of that half share whilst the testator remained alive.

53. Also beside the point is the Appellants' concern (at [47] and [48]) that if the Respondent had been approached about converting the properties to joint tenancies and refused, the solicitor would *'then have given advice which may deprive his testator client of the ability to put the assets out of reach of a claim under the TFM Act'* and would have thereby been *'providing ... advice to the beneficiary which is detrimental to the interests of the testator'*. The testator never had a right to convert the properties to joint tenancies. It was an optional course of action that required the Respondent's consent. Of course, before it was even considered, the solicitor ought to have given advice to the testator that it was one of the options available to him. In

those circumstances, the duty to give effect to the testamentary intention would also have required advice concerning what would happen if joint tenancies were not created, and other options, including leaving a legacy to his daughter from the $110,000 of personal property that would have been left in the estate had the two properties been removed.

54. Finally in relation to this ground, in *Hill v Van Erp* Gaudron J's reference to the significance of Mrs Hill's control was in the context of whether there was sufficient proximity to impose a duty of care. Neither Gaudron J, Gummow J nor McHugh J said anything about the level of the solicitor's control being relevant to whether there is any conflict between the co-extensive duties owed to the testator and the beneficiary. In any event, just as Mrs Hill was in a position to control whether the will would carry out Mrs Van Erp's testamentary intentions, Mr Badenach was in a position to control whether the testator was aware of the risk that the testator's unprovided-for-daughter posed to his testamentary intentions, and whether the testator was aware that there were steps that he could take, if he wished to do so, to minimise the possible consequences of that risk.

Ground 5: Public policy

55. Public policy has been said to be a very unruly horse to ride.[21] There is no good reason to saddle it up in this case.

56. It is clear, as the Appellants concede at paragraph [59] of their outline, that an *inter vivos* transaction structured for the express purpose of avoiding the operation of the TFM Act would not be void as being contrary to public policy. Gleeson CJ has rightly pointed out that the possibility of avoiding the effect of the TFM Act by a disposition *inter vivos* is *'inherent in the scheme of the legislation'*: *Barns v Barns* (2003) 214 CLR 169 at [33], also [36]-[39]. This was neither a new nor controversial insight; in the advice of the Board in *Dillon v Public Trustee of New Zealand* [1941] AC 294 at 302, Viscount Simon LC stated it was *'plainly the case'* that if the testator had transferred the property during his lifetime, it would have been removed from the court's jurisdiction under TFM legislation.

57. In *Barns v Barns,* Callinan J agreed at [139] that the deed to make mutual wills was not contrary to public policy. The South Australian Full Court in *Barns* that had to resolve the question also concluded unanimously that the deed was not contrary to public policy.[22] Lander J pointed out at [72] that *'The Act, however, is not designed to require a person to accumulate assets or indeed to die with an estate. A person is quite entitled to dispose of his or her estate by waste, gift or any other way before that person's death'.*

58. It is a surprising proposition that public policy would prevent a solicitor from being under a duty to take reasonable care to give effect to a testamentary intention, owed both to testator and beneficiary, in circumstances where that duty involved giving advice to consider entering into a transaction that is itself not contrary to public policy.

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21 *Richardson v Mellish* (1824) 2 Bing 229 at 252; 130 ER 294 at 303 per Burrough J.

22 *Barns v Barns* (2001) 80 SASR 331, Lander J at [124], Prior J at [1] and Wicks J at [130] concurring

59. In this regard, it is of significance that the Tasmanian legislature has chosen not to amend the TFM Act to introduce any concept of a notional estate.

60. TFM claims are not novel. New Zealand introduced them with its *Testators Family Maintenance Act 1900*, which was emulated in Australia, England, Ireland and Canada. Unsurprisingly, attempts to circumvent the operation of the legislation by way of *inter vivos* disposition are not novel either, and the issue has been recognised for decades, both in Australia and abroad. Legislative proposals to curb circumvention were made in New South Wales as early as the 1920s and 1930s, but these did not proceed.[23] Section 121 of the Republic of Ireland's *Succession Act 1965* was an early attempt to deal with *inter vivos* dispositions, enabling dispositions within three years of death, not for value, that left children insufficiently provided for to be deemed to form part of the testator's estate, thus being subject to a TFM claim by children (surviving spouses in Ireland have a statutory right to a share of the estate).

61. Some jurisdictions have legislated to catch certain transactions, usually limited to a period of a few years prior to the testator's death. Importantly, many jurisdictions, including Tasmania, have chosen not to attempt to restrict circumvention of the TFM legislation. There are policy arguments against restricting circumvention, just as there are policy arguments in favour of doing so. The purpose of TFM legislation is to make some provision for certain dependants of a testator/testatrix. Such legislation restricts testamentary freedom, but there are limits to that restriction. Testamentary freedom is also *'rooted in moral values'* (cf. Appellants' outline at [60]) and is one of the legislative purposes behind succession law in Australia. Given the Tasmanian legislature and many other legislatures have chosen not to act against circumvention by *inter vivos* transfer, there is no justification for this Court to intervene and impose its own policy decision on testators and their advisers. The cautionary words of Callinan J in *Barns v Barns* at [159] are apposite.

62. In 1974, the English Law Commission[24] recommended anti-avoidance provisions, which resulted in section 10 of the *Inheritance (Provision for Family & Dependants) Act 1975*, which replaced the *Inheritance (Family Provision) Act 1938*. The Commission's report noted at [194] that a minority of those who commented on a working paper's anti-avoidance proposal pointed out that it could be difficult to determine whether the deceased was intending to frustrate a TFM claim, that *inter vivos* gifts were often made to avoid estate duty, that there was little evidence of widespread mischief so as to justify interfering with freedom of disposition, and that the powers could still be avoided, for example by the purchase of an annuity, and that attempting to prevent evasion would only lead to greater complexity.

63. The Queensland Law Reform Commission had the English report in its hands when it reported the need for a wholesale updating of Queensland succession law.[25] It noted (at 27) that *inter vivos* gifts, even if made for the purpose of defeating TFM legislation, were valid, and cited *Re Richardson* [1920] SALR 24, 40 and *Parish v Parish* [1923] NZGLR 712 to support that proposition. It recommended (at 27 and 29) that the law not be altered to deal with avoidance, although it did recommend (at

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23 R Croucher, *Contracts to Leave Property by Will and Family Provision after Barns v Barns [2003] HCA 9* (2005) 27 Sydney L Rev 263 at 268-269, including footnotes 26, 27 and 28.

24 Report No 61, *Second Report on Family Property: Family Provision on Death*, at [198]ff.

25 Report No 22, *The Law Relating to Succession*, February 1978 at 24.

27) that a *donatio mortis causa* be treated as part of the estate for the purposes of a TFM claim.

64. In a 1983 report,[26] the British Columbia Law Reform Commission recognised at [45] that it was open to a testator to avoid the *Wills Variation Act* simply by disposing of his property. The report quoted from both the English and Queensland reports, and agreed with the Queensland position that anti-avoidance provisions should not be added to the legislation, explaining (at 46) that:

> We are concerned that anti avoidance legislation cannot be framed to ensure that it will operate fairly and effectively. Many tax planning transactions would be open to attack. Surviving joint tenants would be prejudiced by having the tenancy severed, and innocent volunteers injured by having to repay gifts perhaps spent some time before the testator's death. The use of an objective test dependent upon an arbitrarily determined period in which such transactions can be attacked would have this effect.

65. In 1997, Australia's National Committee for Uniform Succession Laws reviewed the issue.[27] It noted (at page 77) that 20 years earlier, the New South Wales Law Reform Commission had identified that one volume of precedents for English solicitors contained a precedent for *'Settlement upon Mistress and Illegitimate Child for Purpose of Evading the Inheritance (Family Provision) Act 1938'*. It also noted concerns that had been expressed about whether courts should be given the power to override otherwise valid dispositions of property, protecting the interests of transferees of property in a secure title, and the rights of people to arrange their own affairs in their own way.

66. In 1997, only New South Wales had anti-avoidance provisions in its TFM legislation (the *Family Provision Act 1982*, which replaced the *Testator's Family Maintenance and Guardianship of Infants Act 1916*), which permit a court to designate property as 'notional estate'. The National Committee recommended the inclusion of provisions modelled on the NSW legislation, but with some re-drafting (at 89, 93-94). Despite this, some 18 years later, no other Australian State or Territory has chosen to introduce anti-avoidance provisions.

67. Professor Croucher (President of the Australian Law Reform Commission) points out that there is a real conflict between the policies behind legislative reforms that on the one hand have extended testamentary freedom by giving courts powers to overcome the failure to comply with formalities, and to rectify wills to make them accord with the testator's intentions, and that on the other hand, seek to restrict testamentary freedom by expanding the role of TFM legislation, including by anti-avoidance provisions that claw back property for the estate[28].

68. Given that opinion has been divided for so long about whether anti-avoidance provisions should be included in TFM legislation, and the unwillingness of many legislatures, including that of Tasmania, to legislate to that effect, it cannot be

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26 Report No 70, *Report on Statutory Succession Rights*, December 1983.

27 *Report to the Standing Committee of Attorneys General on Family Provision*, published by the Queensland Law Reform Commission as Miscellaneous Paper 28, December 1997, at pp 76-93.

28 R Croucher, cited above, at 287.

concluded that there is even a policy consensus against *inter vivos* transactions intended to defeat a potential TFM claim, and thus there cannot be said to be any public policy reasons not to impose a duty on a solicitor to advise on the desirability of an *inter vivos* transaction.

69. The last sentence in paragraph [60] of the Appellants' outline cannot be accepted. The enquiries are quite different. The submission suffers from the vice, identified earlier, of seeking to make this case a contest between the testator's daughter and the Respondent. Rather, it is about whether the solicitor breached the duty he owed to his client, the testator, and in turn the beneficiary that his client intended would take all of his estate. The decisions that prohibit an eligible claimant from contracting out of their entitlements under TFM Act attract quite different considerations. It cannot be doubted that a testator's solicitor does not owe any duty of care to a person who might be an eligible applicant under the TFM Act, but who, for whatever reason, the testator has decided to exclude from his will. That does not mean that a solicitor does not owe a duty to his client to make enquiry of whether such applicants might exist, and to explain the purpose and effect of the TFM Act.

70. An eligible claimant, whilst the testator is alive, is in an invidious position if asked to give up their rights. They are obviously subject to the risk that the testator or other family members will bring improper pressure to bear on them. This may include threats or promises in relation to the contents of the testator's will. In any event, whilst contracting out is prohibited, a court may still take the agreement into account in deciding an application under TFM legislation, as it may be a basis on which the applicant had, reasonably, agreed that the testator was making appropriate provision for them during the testator's lifetime, and freeing the testator from the responsibility to do so after their death.[29]

71. It is not the responsibility of solicitors to attempt to secure the benefit of TFM legislation for potential applicants. Rather, it is because a testator has the right to exercise *'an individual choice to produce a result'* (as the Appellants put it at [61]) that it follows that the testator's solicitor, who is under a duty to advise his or her client as to how to achieve their testamentary intention, must be obliged to give advice about how that individual choice may be exercised.

72. The Appellants' description at [61] of the advice that the solicitor must give as being either advice about *'his moral obligations'* or *'how to avoid the very same moral obligation'* is unhelpful, not only because the TFM legislation does not in fact impose an obligation on a testator to do anything (rather, it provides certain applicants with some rights). Legislation does not impose moral obligations on anyone; it imposes legal obligations. The purpose of legislation may well originate in moral values, but that is commonplace. Legislation provides for social security payments, for ships to carry life-boats, and for people rendering emergency first aid to have some immunity from civil liability, all for obvious moral reasons. Yet when dealing with this legislation, the usual legal principles apply. TFM legislation is no different. The solicitor's duty was to give advice about how the statute operated, and how that might impact upon the testamentary intention that the instructions he had been given was intended to fulfil. It was not an occasion to lecture his client about moral obligations.

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29 *Re Pearson* [1936] VLR 355 at 359, also *Re Hatte* [1943] St R Qd 1 at 14.

73. It may be accepted that the Appellants' retainer did not expressly require them to give advice as to how the testator might avoid the operation of the TFM Act (Appellants' Outline at [62]). That is a consequence of the solicitor failing to make any enquiry, and failing to give any advice as to the existence of and effect of the TFM Act. Whether the solicitor had a duty 'to give advice which was not sought in order to avoid a risk of economic loss being sustained by the client's estate' is in issue. Breach of that duty caused loss not only to the estate but also to the Respondent.

74. It is not the role of the solicitor (or the court) to decide which it prefers, 'the economic interests of the Respondent' or 'the economic and personal circumstances of the estranged daughter' (cf. Appellants' Outline at [63] and [65]); neither is it the role or duty of the solicitor to do this. The solicitor's duty was to provide advice about the operation of the law, and it is for the court to decide whether he did so. The choice of what action to take was for the testator, properly advised.

75. The Appellants' argument essentially is that because the TFM legislation has a public policy purpose, a solicitor should not have a duty of care to potentially advise a client how to circumvent the legislation[30], even though that advice might accord with the wishes of the client. Such a proposition strikes at the heart of the relationship between solicitor and client, negating the duty to act in the client's interests and the policy reasons that underpin that duty.

76. The ramifications of the Appellants' public policy argument are profound. It impacts not only on matters such as the present involving TFM legislation, but also on advice concerning revenue and taxation legislation, family law legislation, and so forth.

77. The Appellants propose that the imposition of a duty of care (presumably to both the client and the Respondent) should be negated on grounds of public policy. Such exceptions are limited (the Appellants cite Hayne J's reference to some exceptions in *Cattanach v Melchoir* (2003) 215 CLR 1 at [58]) and because they are exceptions to the rules binding everyone else, they are ripe for controversy. Advocates' immunity is a prime example.[31] Each exception such as that proposed by the Appellants introduces inconsistency into the law, ironically the next ground the Appellants rely upon to attack the decision below.

Ground 6: Inconsistency and incoherence

78. There is some overlap between the Appellants' submissions on this ground and on ground 5, dealing with public policy.

79. The duty alleged in *Cal No 14 Pty Ltd v Motor Accidents Insurance Board* that gave rise to problems of inconsistency and incoherence bears no relationship to this case. The duty alleged in *Cal No 14* would have required the licensee to withhold Mr Scott's motorcycle from him, or to physically prevent Mr Scott from obtaining the keys to the motorcycle or from riding the motorcycle away. Yet if the licensee had done those things, he would have committed the torts of assault and battery (and

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30 Because, as a first step, some advice as to the existence and effect of the TFM Act would need to be given before the client was in a position to ask for advice about whether the TFM Act could be circumvented

31 Indeed this exception will shortly be re-argued before this Court: *Attwells v Jackson Lalic Lawyers Pty Ltd* [2015] HCATrans 176

corresponding crimes), and acted in breach of his duties as bailee. The duty alleged also lacked coherence with the legislative provisions that imposed limitations on the licensee's serving of alcohol, and imposed responsibility on police for the enforcement of the laws relating to driving under the influence of alcohol.

80. *Cal No 14* involved inconsistency and incoherence between legal obligations. There is no such inconsistency in the present case. The Appellants allege inconsistency and incoherence between the legal obligations of a solicitor and a legislative purpose, of the TFM Act. Once it is accepted that it is lawful for a testator to act in a manner that potentially deprives a person who is entitled to apply under the TFM Act from obtaining any substantive relief, and once it is accepted that it is lawful and may be part of a solicitor's duty to advise a client that he or she may take such action, the asserted inconsistency is removed. The Appellants cite no authority for the proposition that this type of inconsistency should preclude a duty from arising.

81. The Appellants submit at [68] that the advice required would be 'inconsistent with the purpose of the statute, namely 'how to by-pass its reach so as to advance the economic interests of the non-client beneficiary'. Two points should be noted. The first is that in the present case no advice was given. The advice ought to have covered many topics, not just how to avoid the operation of the TFM Act. Secondly, the advice required was not how to advance the economic interests of the Respondent. The advice required was to advance the interests of the testator client in having his testamentary intentions fulfilled. In giving advice about the operation of a statute, and how to minimise or circumvent its operation, the solicitor would be doing no more than is done ever day by legal advisers around the country.

82. In giving that advice, the solicitor was not required to have regard to the economic interests of the Respondent. It was no part of the Respondent's case at trial, or on appeal, that the Appellants owed a duty to advise the Respondent about anything, or to give any advice that was in the interests of the Respondent, or to have any regard to the Respondent's interests. The Appellants' concerns at [72]-[74] confuse the person who was the object of the duty (i.e. the testator) with the persons to whom that duty was owed (the testator and the respondent, co-extensively).

83. No part of the solicitor's duty as found by the Full Court required the solicitor to act for the Respondent in any way, let alone to act for the Respondent in breach of his (the solicitor's) obligation not to act for a person whose interests were in conflict with his own interests or those of his client. Furthermore, it is not the responsibility of solicitors to attempt to secure the benefit of TFM legislation for potential applicants. That would undoubtedly raise conflicts of interest between testators, beneficiaries and potential TFM applicants that would be impossible to resolve.

84. No part of the solicitor's duty required him to reveal to the Respondent the nature or extent of privileged advice given to the testator, or indeed the fact that he had given any advice at all. Only if the testator instructed the solicitor to engage with the Respondent about converting the properties to joint tenancies would the solicitor be required to reveal anything to the Respondent, but that disclosure would be (a) pursuant to a fresh duty of care in relation to further instructions; and (b) with the consent of and on instructions by the testator, giving rise to no inconsistency with legal professional privilege.

85. Finally, on the subject of inconsistency and incoherence in the law, the Respondent asks how could a surgeon be required to warn of the risk of an adverse outcome to a patient that was slightly greater than 1 in 14,000[32] but a solicitor not be required to warn his testator client of the risk of a TFM claim? Ms Whitaker trusted Dr Rogers with her eyesight, and Mr Doddridge trusted Mr Badenach with his desire to leave his entire estate to Mr Calvert. The only evidence in the case was that Mr Doddridge wished to leave all of his estate to the Respondent, and that had been his testamentary intention for 30 years. He was asked no relevant questions and given no advice.

Ground 7: Causation

86. The Full Court decided the issue of causation in an orthodox manner, and consistently with ss. 13 and 14 *Civil Liability Act* 2002 (Tas.). Causation was proved in this case by establishing breach (i.e. the failure to enquire and advise) and loss (i.e. the loss of opportunity for the testator to act differently) each on the balance of probabilities[33]. As Brennan CJ said, in *Hill v Van Erp*[34]:

> "So far as the element of causation is concerned, it is sufficient if the links between the negligent act or omission of the defendant and the plaintiff's loss of the benefit are established."

87. Each member of the Full Court accepted that the Respondent's claim for damages was properly considered as a loss of opportunity case[35]. That part of the case has not yet been heard.

88. The principles governing damages for the loss of a chance are set out in the judgment of Mason CJ, Dawson, Toohey and Gaudron JJ in *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332. The key passages are:

> The chance is compensable, notwithstanding that, on the balance of probabilities, it is more likely than not that the plaintiff would not win the competition. (at 349)
>
> And, where there has been an actual loss of some sort, the common law does not permit difficulties of estimating the loss in money to defeat an award of damages. The damages will then be ascertained by reference to the degree of probabilities, or possibilities, inherent in the plaintiff's succeeding had the plaintiff been given the chance which the contract promised. (at 349)
>
> Hence the applicant must prove on the balance of probabilities that he or she has sustained *some* loss or damage. However, in a case such as the present, the applicant shows *some* loss or damage was sustained by demonstrating that the contravening conduct caused the loss of a commercial opportunity which had *some* value (not being a negligible) value, the value being ascertained by reference to the degree of probabilities or possibilities. It is no answer to that way of viewing an applicant's case to say that the commercial opportunity was

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32 *Rogers v Whitaker* (1992) 175 CLR 479 at 482

33 eg Porter J at [93]

34 at 170, citing *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 362

35 Tennent J at [33], Porter J at [87], Estcourt J at [111], [140]

> valueless on the balance of probability because to say that is to value the commercial opportunity by reference to a standard of proof which is inapplicable. (at 355)(italics in original)

89. Brennan J made statements consistent with those of the majority judgment:

> However, a causal relationship between the loss of such an opportunity and the defendant's contravening or tortious conduct must be proved before any issue of assessment of the amount of the loss arises... Although the loss of a valuable opportunity and the assessment of its amount are concepts that can be logically separated, in practice it will usually be the same body of evidence that tends to establish both the existence of a loss and the amount to be recovered. (at 364)
>
> [The plaintiff] discharges that onus by establishing a chain of causation that continues up to the point when there is a substantial prospect of acquiring the benefit sought by the plaintiff. (at 368)
>
> Although the issue of *a* loss caused by the defendant's conduct must be established on the balance of probabilities, hypotheses and possibilities the fulfilment of which cannot be proved must be evaluated to determine the amount or value of the loss suffered. Proof on the balance of probabilities has not part to play in the evaluation of such hypotheses or possibilities... (at 368)(italics in original)

90. This two-step process of first proving on the balance of probabilities that an opportunity was lost and then assessing the value of that loss by reference to the relevant probabilities and possibilities is entirely consistent with sections 13 and 14 of the *Civil Liability Act 2002*. There is nothing to the contrary in this Court's two decisions explaining the cognate provisions of the New South Wales legislation (namely, sections 5D and 5E of the *Civil Liability Act 2002* (NSW)).

91. Section 13(1) has two limbs. It is accepted that the first limb (labelled *'factual causation'*) is a statutory statement of the 'but for' test, with the second limb (labelled *'scope of liability'*) allowing for consideration of any policy reasons as to *'whether legal responsibility should attach to the defendant's conduct'*.[36] In this case nothing turns on the fact that factual causation and scope of liability are treated as two separate and distinct issues by section 13(1), whether or not this bifurcation represents a departure from the common law's approach to the issue of causation.[37]

92. Section 14 was enacted to abolish an instance in which the burden of proof in causation could shift to the defendant.[38] It also confirms that causation – but not the assessment of damages – is to be proven on the balance of probabilities. Kiefel J has confirmed that this is what *Sellars* required:

> Different standards apply to proof of damage from those that are involved in the assessment of damages. *Sellars v Adelaide Petroleum NL* confirms that

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36 *Strong v Woolworths Ltd* (2012) 246 CLR 182 at [18]-[20] per French CJ, Gummow, Crennan and Bell JJ.

37 See *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420 at [43] per French CJ, Gummow, Hayne, Heydon and Crennan JJ.

38 See Heydon J in *Strong v Woolworths Ltd* (2012) 246 CLR 182 at [64].

> the general standard of proof is to be maintained with respect to the issue of causation and whether the plaintiff has suffered loss or damage. In relation to the assessment of damages, as was said in *Malec v J C Hutton Pty Ltd*, "the hypothetical may be conjectured".[39]

93. The same position is taken in England. McGregor on Damages comments[40] that loss of a chance will be recognised as an identifiable head of loss *'when the provision of the chance is the object of the duty that has been breached'* or where *'the essence of the breach of duty is that it deprives the claimant of the chance or opportunity of securing a favourable outcome'*. It is to be assessed as follows (page 346):

> Causation is then established by showing that the claimant has lost the chance and showing this on the balance of probabilities. This then makes for three stages in the enquiry: first, it must be ascertained whether loss of a chance is recognised as a head of damage or loss in itself; secondly, it must be shown that on the balance of probabilities the claimant has lost the particular chance; thirdly, the lost chance must be quantified by resort to percentages and proportions.

94. This is consistent with the oft-quoted judgment of Stuart-Smith LJ dealing with loss of a chance where 'the plaintiff's loss depends on the hypothetical action of a third party, either in addition to action by the plaintiff, as in this case, or independently of it' (*Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602 at 1611A):

> But, in my judgment, the plaintiff must prove as a matter of causation that he has a real or substantial chance as opposed to a speculative one. If he succeeds in doing so, the evaluation of the chance is part of the assessment of the quantum of damage, the range lying somewhere between something that just qualifies as real or substantial on the one hand and near certainty on the other. I do not think that it is helpful to seek to lay down in percentage terms what the lower and upper ends of the bracket should be. (at 1614C)

95. The Respondent agrees with the Appellants (Outline, at [91]) that, properly understood, *Allied Maples* does not sanction a lesser standard of proof in these cases. That the plaintiff must show on the balance of probabilities that the defendant's act caused the loss of a chance, and that then the valuation of that chance is a question for quantification or assessment of damages was confirmed by the English Court of Appeal recently.[41]

96. The quoted passage also makes it clear that the references to 'real' and 'substantial' as opposed to 'speculative' do not require a plaintiff to prove the loss of a chance on the balance of probabilities (which would make the whole category of damages for loss of a chance pointless) or even close to it. On the contrary, the bar for establishing 'real' or 'substantial' is very low. There is no basis in the evidence for the Appellants' assertion at [92] that the lost chance was 'entirely speculative'.

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39 *Tabet v Gett* (2010) 240 CLR 537 at [136], footnotes omitted.

40 18th edition (2009) at 347.

41 *Wellesley Partners LLP v Withers LLP* [2015] EWCA Civ 1146 at [99] per Floyd LJ, Roth J concurring in this regard at [144] and Longmore LJ similarly at [180].

97. If the Respondent could prove on the balance of probabilities not merely that he had lost a chance that a third party (the testator) would have acted in a particular way, but that the third party would in fact have acted in a particular way, then there would be no need for him to seek damages assessed for the loss of a chance. Instead the Respondent would be entitled to receive 100 per cent of his loss on ordinary principles.

98. That is the basis on which Blow CJ considered causation at first instance[42] and Blow CJ dismissed the claim because he was not satisfied on the balance of probabilities that the testator would have taken steps to circumvent the TFM Act. The Appellants are wrong when they assert (at [83] and at [87]) that s. 13 of the *Civil Liability Act* requires this approach, i.e. proof on the balance of probabilities that if properly advised, the testator would have instructed that steps be taken to circumvent the TFM Act. It does not. If it did, s. 13 would have the effect of overruling *Sellars* and its predecessors and abolishing the right to claim damages for the loss of a chance.

99. The ability to claim damages in tort for the loss of a chance in this case is unaffected by *Tabet v Gett*. That case decided that the answer to the difficult – and different – question[43] whether the law should recognise a claim for damages for the loss of a chance of a better medical outcome was 'no'. Of relevance to this case, Gummow ACJ noted that ((2010) 240 CLR 537 at [52], underlining added):

> Further, harm to the interests of the plaintiff which is not sustained by injury to person or property, in the ordinary sense of those terms, nevertheless <u>may</u> qualify in at least some cases as the compensable damage consequent upon a breach of a duty of care as understood in the tort of negligence.

100. As examples of such cases, Gummow ACJ referred to recovery for economic loss in *Hill v Van Erp* and *Perre v Apand Pty Ltd* (1999) 198 CLR 180. Kiefel J at [124] distinguished cases involving financial loss and benefits that have monetary value from the loss of a chance of a better medical outcome. In *Sellars*, Brennan J had pointed out at 364 that there *'is no rational basis for distinguishing between a loss for which more than nominal damages may be awarded in contract and a loss for the purposes of s.82(1) of the Act and the law of torts'* but had recognised (at 359) that in some tort cases, *'a lost opportunity may or may not constitute compensable loss or damage'*.

101. The Full Court dealt with damage as follows:

101.1. Tennent J found at [23] that the Appellants breached their duty of care but that because of Blow CJ's findings below, *'he did not ever reach the position of having to consider the consequences of a breach of duty'* (at [26]). Tennent J concluded that damages should have been assessed for loss of opportunity, and that the matter should be remitted to a single judge, other than the trial judge, for assessment, with the opportunity to adduce further evidence: at [33]-[34]. Tennent J did not otherwise discuss causation or quantum of damage, however by finding that damages should be assessed, her Honour

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42 at [33]

43 The House of Lords confronted the same question in *Gregg v Scott* [2005] 2 AC 176.

must by implication have been satisfied on the balance of probabilities that the failure to advise caused an opportunity to be lost;

101.2. Porter J found at [87] that the Respondent's case 'was always about a loss of opportunity' and at [93] that the 'loss of opportunity occurred when the testator was not given the chance to consider what steps, if any, he would have taken in anticipation of a claim under the Act'. Porter J then held at [95] that:

> Section 13 of the *Civil Liability Act* provides that a prerequisite for a decision that a breach caused particular harm is that the breach was a necessary element of the occurrence of the harm. That must be so in this case, and the respondents did not argue otherwise...

101.3. This was clearly a finding that on the balance of probabilities, there was a loss of opportunity. Porter J then found at [95] that he was satisfied that there was *'more than a negligible chance that the testator would have taken action to circumvent a possible claim under the Act, the most obvious means being the two alternatives relied on by the appellant'*. This opens the door for the second step in the *Sellars* process, namely the assessment of damages, which Porter J remitted.

101.4. The Appellants are wrong when they assert at [84] that Porter J failed to apply the 'but for' test correctly. The Respondent was required to, and did, establish on the balance of probabilities that the Appellants' negligence caused the damage complained of, namely the lost opportunity. The Respondent was not required to prove on the balance of probabilities that the testator would have taken any particular steps.

101.5. Porter J at [95] concluded that the inference that the Respondent would have participated in the conversion to joint tenancies was *'one reasonably and readily drawn'*. After all, the Respondent brought the proceedings, which pleaded (Statement of Claim paragraph 14) that the Appellants failed to advise the testator that he could seek to convert the properties into joint tenancies, or make *inter vivos* gifts to the Respondent (including by way of *donation mortis causa*). Despite this, the Respondent was not asked in cross-examination whether he would have been willing to participate in a conversion to joint tenancies, although he was asked whether his health was good at the time (P17 LL15-17), suggesting that the cross-examiner had turned his mind to whether the Respondent may have had a basis for fearing that he would not survive the testator, the greatest risk to the Respondent in any conversion to joint tenancies.

101.6. Estcourt J at [134] distinguished between cases where damage can be proven on the balance of probabilities, and those where the loss of the chance is the damage. *'This is a case where the loss of chance is the damage itself'* and *'In the latter case, a plaintiff need only establish on the balance of probabilities that the chance existed'*. Lest there be any doubt, at [143]-[144] Estcourt J repeated the two-stage *Sellars* process of proving on the balance of probabilities the chance existed, then assessing damages by evaluating the lost chance, providing it was 'beyond negligible'.

101.7. Estcourt J pointed out at [131] and [140] the obvious reason why this could only ever be a loss of a chance case, namely, that the Respondent's opportunity to benefit depended on the actions of a third party, the testator,

and the evidence available before Blow CJ *'could not establish that had the testator received proper advice he would have acted as advised'*.

102. The approach of the members of the Full Court to the issue of causation was orthodox and, it is submitted, correct.

Part VII: Argument re: notice of contention or notice of cross-appeal

103. Not applicable.

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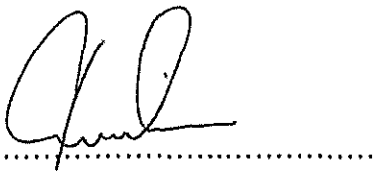
Part VIII: Estimate of time

104. The respondent's counsel estimates that the presentation of the respondent's oral argument will take not more than two hours.

Dated: 21 December 2015



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