Decision on preliminary issue. An advocate owes no duty of care to the presumptive former beneficiaries of a testator who wishes to make a new will which will adversely affect their expectations with regard to ensuring that the testator has testamentary capacity; also, *dicta* with regard to grounds for allowing amendment to a pleading after expiration of a period of limitation and as to the appropriateness of ordering the trial of a preliminary issue.

[2022]GRC063

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

BETWEEN:

(1) ROBERT DOREY
(on behalf of himself and to the extent indicated in the Cause, on behalf of the Estate of the late Sir Graham Dorey

(2) JANE PENELOPE McLELLAND)

(3) MARTYN DOREY

Plaintiffs

-v-

RAYMOND ASHTON

Defendant

Before: Her Honour Hazel Eleanor Marshall KC
Lieutenant-Bailiff

Counsel for the Plaintiffs: Advocate A Ozanne
Counsel for the Defendant: Advocate G S K Dawes

Hearing Date: 23 August 2022

Judgment handed down: 9 September 2022

Legislation and cases referred to:

Legislation

Law Reform (Tort) (Guernsey) Law 1979, s 4
The Mental Health (Bailiwick of Guernsey) Law, 2010
The Inheritance (Guernsey) Law, 2011
Royal Court Civil Rules 2007 r1

Cases
(1) Guernsey

Jefcoate v Spread Trustee Co Ltd [2013] GLR 220
*Fairhead v Praxis Holdings (*2014) Guernsey Judgment 12/2014
*Alpha Developments Ltd v Barclays Wealth Guernsey) Ltd (*2014*)* Guernsey Judgment 30/2014
Broadhead v Spread Trustee Co Ltd (2014) Guernsey Judgment 46/2014

(2) UK

Sutton v Drax (1815) 2 Phil 323
*Wilkinson v Corfield (*1881) 6 PD 27,
Donoghue v Stephenson, [1932] AC 562
Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC
Tilling v Whiteman [1980] AC 1
Ross v Caunters [1980] Ch 297
Caparo Industries Plc v Dickman [1990] 2AC 605
White v Jones [1995] 2 AC 207
Worby v Rosser (1999) ITELR 59 CA
Steele v Steele [2001] C.P. Rep 106
Khan v Falvey [2002] EWCA Civ 400
Feltham v Freer Bouskell [2013] EWHC 1952 (Ch)

(3) Commonwealth

New Zealand
Knox v Till [1999] 2 NZLR 753

Canada
Scott v Cousins [2001] OJ 19
Hall v Estate of Bruce Bennett [2003] WTLR 827
Slobodianik v Podlasiewicz (2003) 228 DLR 4th 610
Graham v Bonnycastle (2004) 243 DLR (4th) 617

JUDGMENT
on preliminary issue

The dispute in brief

1. This is the trial of a preliminary issue as to whether an Advocate who takes instructions for, prepares and supervises a will for execution by a testator owes any duty to the persons who would benefit from the testator's estate if no such will were executed to take care to establish that the testator has testamentary capacity.

The Parties

2. The Plaintiffs in the action, who appear by Advocate Alison Ozanne, are three of the four children of the late Sir Graham Dorey, who died on 25 June 2015, by his first marriage to Lady Penelope Dorey. The first Plaintiff is also the administrator of the Estate of Sir Graham, and by an amendment to the Cause in this matter which I allowed on 15 June 2022, he sues on behalf of the Estate in respect of part (only) of the claim for damages otherwise made by all three Plaintiffs in their personal capacity.

3. The Defendant, Dr Ashton, who appears by Advocate Gordon Dawes, is himself an Advocate. (I refer to him as "Dr Ashton" simply for convenience.) He took instructions from Sir Graham for the preparation and execution of two wills of realty and of personalty ("**the Wills**") made by Sir Graham in October 2004, and apparently therefore comprising his last will and testament at the time of his death. The effect of the Wills was to displace and reduce the inheritance expectations at that time of Sir Graham's four children and to increase those of Sir Graham's second wife, Lady Cicely Dorey ("**Lady Dorey**").

The Claims in the action

4. The Plaintiffs' claim against Dr Ashton is that he was negligent in and about taking the instructions for the Wills, and arranging for and assisting in their execution by Sir Graham, in circumstances where Sir Graham did not have testamentary capacity. It is important, in the light of arguments subsequently made, to record the history of the claims in some detail.

5. Prior to the hearing on 15 June, 2022, the Cause advanced three claims, as being made by the three Plaintiffs personally, ie as beneficiaries of the estate of Sir Graham. The fourth sibling, Suzie Dorey did not join in this action, but as no point is taken as to whether this affects the proper constitution of the action I need say no more about this.

6. The three claims were for

   (1) the fees paid by Sir Graham to Dr Ashton for his services in connection with the preparation and execution of the Wills, in the sum of £10,471.00,

   (2) the legal costs (£146,000 odd) incurred by the four siblings in subsequent probate proceedings brought against Lady Dorey to challenge the Wills, which proceedings were compromised, with each side paying their own costs, and

   (3) the sum of £375,000 which was paid also by the four siblings to Lady Dorey as part of that compromise agreement, in return for which Lady Dorey conveyed her interest in the house (her residence) to them and renounced any other claim which she might have on Sir Graham's estate or to be his executrix. I understand that this resulted in the Wills being admitted to probate, for convenience, but with Robert as Administrator.

7. By an application to amend the Cause, the Plaintiffs sought to amend these claims to assert "*for the avoidance of doubt*" that they were brought by the First Plaintiff, Robert Dorey, also in his capacity as Administrator of Sir Graham's Estate.

8. When this application came before me, I allowed it in respect, only, of Claim (1) above. My reasons for this were as follows. By now, the prescription period in respect of any claim to be made on behalf of Sir Graham himself, but through his Estate, must have expired on any basis, it being more than six years from Sir Graham's death. However, as regards the claim in respect of Sir Graham's own expenditure on legal fees, all the facts except for an express averment of Robert's status as Administrator had already been pleaded and indeed, the point that this was an Estate claim and was not vested in the Plaintiffs personally had been taken in the Defences. That Estate claim was, therefore, not only based on the same or substantially the same facts as those already pleaded, but was perfectly well understood by the Defendant.

9. In contrast, with regard to the other two heads of claim, I took the view that it would have been necessary to plead further facts to found any claim which might be made in respect of them by the Estate because this was a claim to recover the Plaintiffs' personal expenditure on probate litigation costs and the settlement sum. This was not least because one of the amendments sought to be made in respect of these latter two claims was that, again *"for the avoidance of doubt"* that *"the First Plaintiff avers, to the extent necessary, that* [those two claims] *are sums which are liable to be reimbursed from Sir Graham's estate"* with no further explanation of this averment.

10. It was my judgment, therefore, that while any amendment to plead the different capacity of the First Plaintiff (Robert) did introduce a fresh cause of action, in respect of the claimed recovery of Sir Graham's expenditure on legal fees, this arose so obviously from the facts already pleaded in support of the Plaintiffs' supposed personal claim that it was fair and reasonable to allow the additional plea of Robert's capacity to be made. With regard to the second and third claims, it was far less clear to me that the new causes of action constituted by making those claims on behalf of the Estate could be fairly said to arise out of "substantially" the same set of facts as those already pleaded, but that significant further facts would need to be pleaded, but in any event, I took the view that, because such claims would, as a matter of procedure, relate back to the date of the original cause, thereby circumventing a potential defence of prescription, I did not consider it fair and reasonable to allow the amendment: see *Jefcoate v Spread Trustee Co Ltd* [2013] GLR 220. It was for this reason that I distinguished between the first and the second and third heads of claim.

11. In the interests of completeness, I record that in the course of discussion I expressed the view that it was now too late to make the interesting argument advanced by Advocate Dawes that *Jefcoate* (above) might have been wrong to hold that there was any jurisdiction at all, in Guernsey, to permit an amendment which had the effect of circumventing a prescription period. The basis for such a contention was (i) that doing so was a power made available to courts in England only by statute

(the *Limitation Acts 1939* and *1980* and the English Rules of Court authorised thereby) and there were no such statutes in Guernsey, and also (ii) that this conclusion failed to take account of the fact that prescription in Guernsey Law extinguishes the cause of action itself, whilst limitation in English law merely bars the remedy for any such stale cause of action. I took the view that the power to allow amendment to pleadings was an inherent discretionary power of the Royal Court, which was therefore fully able to consider and regulate the effects of granting such permission in any particular case. This had been considered in considerable detail in *Jefcoate* (above) by Sir Richard Collas, B, who was thoroughly acquainted with distinctions between English common and statutory law and Guernsey law and coutûme, and who could be expected to have fully appreciated and apply these, but who had, nonetheless approved and laid down the *Jefcoate* approach as applying in Guernsey. It had also been followed in Guernsey subsequently in, at least, two cases: *Fairhead v Praxis Holdings (*2014) Guernsey Judgment 12/2014 by McMahon DB (as he then was) and by me in *Alpha Developments Ltd v Barclays Wealth Guernsey) Ltd* (2014) Guernsey Judgment 30/2014. Therefore even if Advocate Dawes' argument might have some academic force, the *Jefcoate* approach has now been embedded in Guernsey law and it is, in my judgment, too late to seek to overturn it, at least at first instance.

12. In my judgment the only effect which Advocate Dawes' point regarding the difference in the nature of prescription in Guernsey and limitation in England can reasonably have, is that, given the fact that the dating back of an amendment will resuscitate a cause of action which is otherwise dead, rather than simply preventing a particular defence to a live cause of action, the Guernsey courts may think it right to impose a rather more stringent test for it being "fair and reasonable" to allow an amendment to introduce a fresh cause of action after the expiration of a prescription period, even though it arises from the same or substantially the same facts as those already pleaded, than an English Court might. Any such distinction would not, however, affect my decision in this case that it was right to allow Claim (1) to be amended to advance a claim on behalf of the Estate, but not Claims (2) and (3).

13. Advocate Ozanne reminds me at this hearing that, at the earlier hearing, she withdrew the application to amend to plead Robert's capacity as Administrator in respect of Claims (2) and (3). She says she did so in response to my stating that I found it difficult to see how these could be advanced as claims on behalf of the Estate at all. Even if that is the case, (although my recollection is that I did specifically rule against those amendments in any event), she accepts that she did not seek to stand over her application in respect of those amendments, nor to make any reservation of position with regard to repeating or restoring such application at a later time. The situation for present purposes is therefore that the pleadings do not contain any asserted claim on the part of the Estate against Dr Ashton, to recover the Plaintiffs' legal costs of the probate action, or the settlement sum paid, as damages for Dr Ashton's alleged negligence in dealing with Sir Grahams Wills in October 2004.

14. The upshot, therefore, is that there are four heads of claim which now stand to be considered either directly or as background to the application with which I am now concerned. These are two claims, one by Robert as Administrator of Sir Graham's Estate and one still technically on the pleadings by the three Plaintiffs personally, (clearly in the alternative, as there cannot be double recovery) for recovery of Sir Graham's legal costs for preparation of the Wills, and two claims made by the three Plaintiffs personally for (respectively) recovery of their litigation costs of the probate action and the settlement sum. The vast majority of the claims, - just over 98% - is thus comprised of the latter personal claims. The total of these personal claims is approximately £522,000, plus interest.

The Defences

15. Dr Ashton robustly disputes the total claim in virtually all its component parts He disputes that he was negligent in his conduct at all. Even if he had been negligent, he disputes that Sir Graham in fact lacked testamentary capacity at the relevant time, such that such negligence did not cause any damage as it did not cause an invalid will to be made. Third, even if Sir Graham had lacked capacity, Dr Ashton asserts that he believed that Sir Graham did have capacity, and that that belief was reasonable.

16. However, and materially for present purposes, Dr Ashton takes two rather more fundamental defence points, each of which would put an end to the Plaintiffs' personal claims.

17. The first is that the Plaintiffs' personal claims are prescribed for having been commenced more than six years after the accrual of their cause of action.

18. The reasoning behind this is as follows. This cause being in tort, it is governed by s.4 of the *Law Reform (Tort) (Guernsey) Law 1979*, and the accrual of the cause of action occurred when the Plaintiffs first suffered, to any significant extent, the type of loss ("**actionable damage**") which is claimed to have been caused by the tort in question, ie the material negligence. The Plaintiffs' claim was launched on 1 June 2021. They claim, as damages, legal expenditure incurred in consequence of the alleged negligence, ie economic loss. Advocate Dawes points out that the Plaintiffs must, on the facts, have incurred expenditure of such type more than six years prior to this, ie before 1 June 2015. This (it is said) is to be deduced from the irrefutable fact that they were engaged in legal proceedings to try to recover documents from or concerning Dr Ashton as evidence for their contention that their father had lacked capacity, since well before 20 February 2015, because that is the date of an adverse Court of Appeal judgment which they obtained in this regard. One cannot (he submits) avoid a limitation period by limiting one's claim to the loss and damage incurred within six years of the launch of proceedings if other actionable damage of the same nature was caused earlier than that: see *Khan v Falvey* [2002] EWCA Civ 400.

19. The second, and even more fundamental point, though, is that Dr Ashton denies that in taking instructions for and arranging the execution of the Wills, he owed any duty of care to the Plaintiffs in their personal capacities as the then presumptive beneficiaries of Sir Graham's Estate, at all.

Immediate procedural history

20. By an application made on 9 February 2022, the Dr Ashton applied, insofar as here material, for an order that the issues of (i) the existence of any duty owed to the Plaintiffs and (ii) whether the Plaintiffs' claims are prescribed, be tried as preliminary issues.

21. On 15 June 2022, having heard these applications, and having regard to the various relevant factors set out in *Steele v Steele* [2001] C.P. Rep 10 by Neuberger J, as he then was, I refused to order the trial of a preliminary issue regarding prescription. The Plaintiffs' first answer to the Defendant's prescription argument was that their cause of action did not accrue until the death of Sir Graham (and thus within six years before the issue of these proceedings); they rely on a *dictum* of the Court of Appeal on 20 February 2015 in the proceedings referred to above, to the effect that the validity of the Wills could not be questioned during Sir Graham's lifetime, as an effective statement of the material date of the accrual of their cause of action. Their second alternative answer was that they suffered from an operative *empêchement d'agir,* (whether *an empêchement de fait* or an *empêchement de droit)* until after Sir Graham's death, as a result of the self-same *dictum* and their consequent reasonable understanding of their position.

22. This was plainly likely to become a matter of complex argument and analysis, which could depend very much on findings of fact (cf *Broadhead v Spread Trustee Co Ltd* (2014) Guernsey Judgment 46/2014). I therefore took the view that it was unlikely to provide the necessary and obvious likely benefits which would justify taking it as a preliminary issue, rather than hearing it as part of a complete trial, and that doing so would very likely turn out to be one of the "*treacherous shortcuts*" (see *Tilling v Whiteman* [1980] AC 1 per Lord Scarman) which preliminary issues, which look like a good idea at the time, can all too easily turn out to be in practice.

23. However, and despite forceful argument from Advocate Ozanne, I concluded that it was appropriate to order the trial of a preliminary issue in respect of the "no duty" point. This appeared to me to be a pure point of law, although Advocate Ozanne argued that it would in itself also turn on matters of fact, and was therefore to be regarded as a matter of mixed law and fact and not an appropriate matter for a preliminary issue. She failed to convince me, however, that there could be any significant issues of fact which would be relevant which Advocate Dawes, for Dr Ashton, would not be able - or even be obliged - to concede in her favour for the purposes, only, of the trial of this point as a preliminary issue, and since a decision on this issue was capable of producing a decisive result in the action at an early stage, with consequent saving of time and expense, I therefore directed that there should be such a trial. Hence this hearing.

Grounds for trial of the preliminary issue

24. I should record that in deciding that it was appropriate to order the trial of this preliminary issue, I carried out the balancing exercise between the various factors highlighted in *Steele v* Steele above, and in doing this I did also take into account the fact that I had just previously allowed the Plaintiffs to amend their claim to plead that the First Plaintiff also sued in his capacity as Administrator of the Estate of Sir Graham, and therefore on behalf of the Estate, in respect (only) of the claim for repayment of legal fees. In applying the *Steele v Steele* factors, I took into account that my having allowed this amendment meant that, inevitably, there would now proceed towards trial an issue which, on the face of it, would involve the investigation of whether Sir Graham had, in fact, had capacity to give instructions and/or testamentary capacity when he made the Wills or, more accurately, whether it had appeared, or could reasonably have appeared, to Dr Ashton, at the time, that he sufficiently did. This would seem to require a wide-ranging factual enquiry which would therefore not be avoided even if I were ultimately to hold in favour of the Defendant on the issue of absence of any duty. However, given the small size of that particular claim, and the requirement to

> *"deal with the case in ways which are appropriate to the amount of money involved ….* "

(see *Royal Court Civil Rules 2007* r1 – *the Overriding Objective* – r 1(2)),

and that

> "*the parties are required to help the court to further the overriding objective*"

(see r 1 (4)), it seemed to me that the nature of any such trial could be expected to take a rather different course from litigation about sums in excess of £500,000, and that therefore the objectives and likely consequences of potentially saving time and expense, and even conducing to a settlement of the dispute, which are further considerations mentioned in *Steele v Steele* (above), were not outweighed by the fact that the trial of this small claim would still require disposal.

Background

25. Having set the procedural scene, I think it appropriate to record something of the factual background to this application, even though it is not strictly relevant to the matter which I have to decide. I do so to illustrate the flavour of the litigation, and also because of Advocate Ozanne's strongly pressed argument that the circumstances and consequences cannot be ignored, for fear of causing an injustice to her clients.

26. Sir Graham's first wife Penelope, the Plaintiffs' mother, died in 1996. Sir Graham married Cicely in 1998. At the time, they entered into a pre-nuptial agreement to the effect that property owned by either of them, or subsequently acquired by either of them respectively, should remain their individual property and that the other should have no claim on such property under any circumstances, and that the survivor of them should have no claim on the real or personal property of the first deceased except as provided by any will (and possibly also any settlement, although

this is not particularly material) executed by such first deceased. I understand that both Sir Graham and Lady Dorey had children by their former marriages and the purpose of this agreement would thus seem to have been to keep the property of each "side" of the combined family separate, whilst still allowing for an adjustment to this subsequently by the voluntary act of either party.

27. It is, I think, fair to say that relations between Sir Graham's four children and the second Lady Dorey have not been very cordial, even since before the matters which are material here.

28. It is also pertinent to record that at the relevant time (2004), and in fact until 2012, Guernsey inheritance law followed the Norman system of forced heirship. A person was only able to dispose freely of his or her property by will to a very limited extent. The English system of entirely free testamentary powers, coupled with rules as to inheritance on intestacy and a right for spouses (or similar) and for actual dependents of a deceased person to apply to the court for reasonable provision to be made for him or her out of the estate of the deceased if it has not been, were introduced only by *The Inheritance (Guernsey) Law, 2011*, and thus after all the material events in this case. It is also to be noted that during this period Guernsey did not have legislation enabling the making of a "statutory will" on behalf of a person who did not have testamentary capacity. This power was, again, only introduced in *The Mental Health (Bailiwick of Guernsey) Law, 2010*. Thus, at the relevant time, if a person lost testamentary capacity, the presumptive disposition of his or her estate at the time when this happened was locked in and could not be varied.

29. It is said by the Plaintiffs that Sir Graham began to show signs of the onset of dementia in 1996, initially as regards his memory. He retired as Bailiff in 1999 and it is said (though Dr Ashton does not admit this) that this was in part because of his perceived cognitive difficulties. It is further said that his cognitive abilities gradually deteriorated over the remainder of his life, and this was probably the result of Alzheimer's disease, as suggested by subsequent scans in (for example) 2001. Various incidents and examples of Sir Graham's cognitive impairment over the period from 2001 – 2004 are asserted and pleaded in much detail in the Cause.

30. In June 2004, the children took the view that their father was not able to manage his own affairs - a mental state which is not, however, necessarily the same as lacking testamentary capacity; it is perfectly possible to lose the former whilst retaining the latter. They made an application to the court for a Guardian to be appointed for their father. Lady Dorey opposed this application, at least initially, (I infer that it was not she who was the proposed Guardian), and indeed, I understand, so did Sir Graham, who was (Dr Ashton says) extremely offended by it. The Guardianship matter was contested over the period from June to December 2004, when Dr Ashton was himself appointed as Guardian, he having acted for Sir Graham in the Guardianship proceedings. It is of course the case that a prospective Patient is entitled to have legal representation, either to contest that a Guardian is required, or is appropriate at all, or as to any other aspect of his own affairs. Dr Ashton in fact resigned, about a year later – he said, I understand, because of interference by

the children in his role – but, whatever the reason, the late Advocate Allez was appointed in his place.

31. The making of the Wills thus took place during the period of the contested Guardianship application. The Plaintiffs say that at the end of 2003, Sir Graham had given confused, confusing and conflicting instructions to the late Advocate Perrot to prepare wills for him, such that Advocate Perrot had written to Lady Dorey, expressing concern as to Sir Graham's testamentary capacity. Dr Ashton does not admit this, as he says he knows nothing of it.

32. After the serving of the Guardianship application, Sir Graham was seen and assessed by a specialist, Dr Liddell, in Cardiff, on 23 September 2004. Dr Liddell provided a report, apparently dictated on 24 September 2004 though not formally signed off by him until 4 October 2004, and he forwarded this to Advocate Mark Ferbrache, who was Lady Dorey's advocate, on 27 September 2004. As to this report, the Plaintiffs stress that Dr Liddell appeared to acknowledge that his instructions had really been received from Lady Dorey, and that there was "*not much of comfort*" for her in the report. Dr Ashton, who saw and relied on this report, stresses that Dr Liddell stated a belief that, at the time of his seeing Sir Graham, Sir Graham *did* have testamentary capacity, whilst stating that if Sir Graham wished to make a will, it would be prudent to have his testamentary capacity assessed again. Dr Ashton says he read this comment as a cautionary note in case a significant period of time might elapse before this took place, but that as he proceeded with the Wills within a few days, that was not the situation.

33. The Cause then pleads in great detail an almost hour by hour critical account of the steps which Dr Ashton is alleged to have taken, or not taken, in relation to taking instructions from Sir Graham for the preparation of the Wills over the following four or five days, up to 1 October 2004, when they were executed. On that date, Dr Ashton arranged for the execution of the Wills to be recorded on video in a recording studio, with himself and his assistant, Mr David Domaille (later Advocate Domaille), present with Sir Graham, together with two Jurats attending as witnesses (as I understand was the required procedure at that time), and with Dr Liddell being present by video link. Lady Dorey was not present.

34. In the Cause, the Plaintiffs lay stress on the matters which they say must or should have made it clear to Dr Ashton that Sir Graham did not have testamentary capacity throughout this period and the execution meeting. They include the alleged close and overbearing involvement of Lady Dorey and (at the outset) of Advocate Mark Ferbrache; the singular fact that Sir Graham taken for assessment to a specialist in Cardiff; the opinions of others such as Dr Ashton's assistant, Mr Domaille, that Sir Graham did not have capacity; the unclear and changing state of Sir Graham's apparent instructions prior to the execution meeting such that (I believe) two alternative versions of the proposed Wills were prepared for the meeting, and the alleged overbearing attitude of the Dr Ashton himself. There are other criticisms which they claim to draw from the video recording. They sum all these up in a list of 32 matters of the knowledge which is (they say) to be imputed to Dr Ashton and which they submit, in the Cause, made it negligent of him to draft and to arrange

for the purported execution of the Wills, in 14 respects, which are pleaded as particulars of negligence.

35. Dr Ashton avers, at the outset of his Defences, that he did not owe a duty of care to the Plaintiffs not to make a will for Sir Graham In his Amended Defences this is widened to plead that he did not owe a duty of care to the Plaintiffs at all. In the Amended Defences, he pleads to each of the facts and matters asserted by the Plaintiffs. He admits many but denies the interpretation or significance put upon them, and he asserts that many others are selectively, partially or tendentiously pleaded. He denies other allegations outright, and denies that such matters as he does admit were sufficient to constitute negligence in law. He denies that Sir Graham did not have testamentary capacity at the time of the execution of the Wills, or alternatively, that, in all the circumstances taken fairly together, he could have been expected to conclude that Sir Graham did not have testamentary capacity. He asserts that he was reasonable in concluding that it was reasonable and proper for him to assist Sir Graham to make the Wills, as he did, and that it would in fact have been a breach of his duty to Sir Graham to decline to do so. He relies, in particular, on Dr Liddell's written report referred to above, based on a personal assessment a few days earlier, and also on Dr Liddell's statements at the execution meeting, in answer to express questions from the Jurats at the end, that it was "*A little more borderline than I had anticipated*" but that "*I think in broad terms Sir Graham knows what he wants to do*" as endorsing his view that Sir Graham did have the necessary degree of testamentary capacity, and justifying his (Dr Ashton's) accepting Sir Graham's apparent instructions and willingness to execute the Wills in the form drafted, as being a proper fulfilment of his (Dr Ashton's) duties as Sir Graham's advocate.

36. The above account provides, I hope, a reasonably balanced and neutral description of the matters pleaded and in dispute. It is not my function at this stage, to express any opinion as to their cogency or validity – in either direction. Interestingly, of course, the Plaintiffs consider that the pending Guardianship Application was a reason why wills should not have been prepared for or made by Sir Graham in the circumstances at all, whereas Dr Ashton's perspective was that the pending Guardianship Application, which he says had very much angered Sir Graham, was a positive reason for enabling Sir Graham to make Wills if, and as, he apparently wished to do, and even to do this as a matter of urgency, and this informed his attitude towards his duties to his client.

The law

37. I turn now, therefore, to the law as to whether or not Dr Ashton owed the claimed duty of care to the Plaintiffs in the circumstances set out above. This can only be a duty in tort, and it is, of course, in law, a different question from that of his owing - as he undoubtedly did - a duty of care to Sir Graham, as his client, which duty would be a duty arising under the contractual retainer creating the relationship of advocate and client.

38. There being no Guernsey cases on the point, the Advocates have turned to English and Commonwealth case law for persuasive guidance on the matter, and both of them start from the well-known English decision of *White v Jones* [1995] 2 AC 207.

39. This line of authority originated in the case of *Ross v Caunters* [1980] Ch 297, which was the first case to break the vexed ground of whether a solicitor acting for a testator could be held liable to any third party as a result of matters going wrong (to use a deliberately non-legal term) with regard to the execution of his will.

40. In *Ross v Caunters* a testator's bequest to a beneficiary failed after his death, because her husband had witnessed the will, thereby disqualifying her from benefit. She sued the solicitor in negligence, relying on his having failed to warn the testator about the requirements for independent witnessing, which would ensure that the gift was effective. She succeeded. Megarry J held, on the basis of the simple requirements of tort, ie the well-known general, "neighbour" principle of *Donoghue v Stephenson,* [1932] AC 562, that the solicitor owed a duty to the prospective beneficiary to take reasonable care to ensure that she did not suffer loss as a result of the testator's expressed wishes not being implemented owing to his will being procedurally invalid. In failing to warn the testator that witnesses must be entirely independent and unconnected with any beneficiary, the solicitor had breached that duty, causing, in the event, damage to the intended beneficiary by her legacy being invalidated. The reasoning in the judgment very much focused on the "striking" result of holding that there was no such duty, namely that the client (now represented by his estate) would have no claim for such negligence (or only a nominal claim in contract) because the estate was not depleted and had suffered no loss, but the disappointed beneficiary whom he had intended to benefit and who had suffered the loss, would have no claim because she was not the client and had no contractual relationship with the solicitor.

41. Whilst the decision in *Ross v Caunters* was largely welcomed, and survived for the following 15 years without causing any practical problems, the juridical basis for the decision caused academic unease, and the House of Lords took the opportunity to review the position in *White & Jones* [1995] 2 AC 207. That case was different, and something of an extension. In it, the solicitor took instructions for the making of a will which would benefit the testator's daughters, in place of a former will under which they had been disinherited. Indeed, the appointment with the solicitor was made by one of the daughters. However, the solicitor did not do anything for several weeks, and in the interim, the testator had an accident whilst on holiday and subsequently died without the replacement will having been made. The trial judge distinguished *Ross v Caunters,* and held that there had been no duty to the intended beneficiaries to get on promptly with drafting the will, but he said that if he had found such a duty to exist, he would have held it to have been breached by the solicitor's unreasonable dilatoriness. There had, therefore, been a negligent breach of the solicitor's duty to the client-testator, but it did not extend also to the daughters as prospective beneficiaries.

42. In the Court of Appeal, the decision was reversed. *Ross v Caunters* was approved and affirmed. Sir Donald Nicholls V-C (as he then was, and on whose judgment

Advocate Ozanne places much reliance) followed the approach of *Caparo Industries Plc v Dickman* [1990] 2AC 605, as regards the appropriate test for an "incremental" extension to the law of negligence from the original principle laid down in *Donoghue v Stevenson* (above), and he found that the three requirements for such extension were present: (1) The foreseeability of the relevant damage was obvious; (2) the fact that the solicitor knew who was to be benefited as a result of his commission created a sufficient "special relationship" of "proximity" between him and the intended beneficiaries, and (3) it was fair, just and reasonable (perhaps more accurately, not unfair, not unjust and not unreasonable) to impose the suggested duty. He did not flinch from this being described as

> "*fashioning an effective remedy for a solicitor's breach of duty to his client*"

see *White v Jones* (above) at p 223 F, and on the above analysis, one can clearly see why. The duty was described by Farquharson LJ as

> "*to use proper care in carrying out the client's instructions for conferring the benefit on the third party*",

who thereby obtained a right and a claim.

43. In the House of Lords, however, the matter was clearly viewed as not being so simple, nor so blindingly obvious. Indeed, the decision itself was only a majority decision, Lords Goff, Browne-Wilkinson and Nolan being in favour of dismissing the appeal, and Lords Keith and Mustill being in favour of allowing it.

44. Lord Goff's was the main speech and contained an in-depth analysis of factual situations in which X suffers loss but has no claim, and Y has a claim but suffers no loss, looking for the principles by which the law has succeeded (or failed) in finding a remedy for X, based on the principle which obviously drove the decision in *Ross v Caunters* that the law strives to fashion a remedy where possible, where it appears so iniquitous that there should be none. He cautioned, however, against the "*impulse to do practical justice*" causing too great and uncontrolled a departure from principle (p 259G onwards).

45. He carried out an extensive review of principle, noting that the imposition of any such duty on the solicitor in the *White v Jones/Ross v Caunters* situation sat uncomfortably with some basic principles of liability in negligence, eg that there can be no damages for loss of a mere expectation (a *spes successionis)*, that there is no cause of action for pure economic loss in tort except in the limited situation recognised in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, and that there is no tortious liability for a mere omission to act, rather than for a negligent action. Any attempted analysis of the situation under consideration, whether in terms of a tortious liability or of some kind of extension of the solicitor's contractual liability, was troublesome when (as was the case at that time) the doctrine of privity of contract prevented a third party from taking the benefit of another's contract in English law. He noted the ways in which the seemingly unfair consequence of a party who had suffered loss having no claim, when others who had claims had suffered no loss, had been dealt with in other areas of law, such as shipping, and building contracts, and in other jurisdictions, in particular German

law. In the end, he disapproved the simple *Ross v Caunters* approach, but concluded that a duty situation which could benefit the disappointed beneficiaries could be fitted into the principle of *Hedley Byrne v Heller* (above), on the basis that the taking of instructions to effect a will to benefit beneficiaries created the necessary "special relationship" of "proximity" to found a duty of care between the solicitor and the intended beneficiaries, because it amounted to an assumption of responsibility by the solicitor to those intended beneficiaries not, by his negligence, to prevent the known benefits intended by his client from accruing to them.

46. The other assenting judgments, (Lords Browne-Wilkinson and Nolan) emphasise the very limited extension of the scope of the tort of negligence effected by holding that the situation in *White v Jones* came within *Caparo v Dickman* principles, expressing misgivings about any suggested wider application. This caution and limitation is further emphasised by the fact that the decision was a majority decision only, the two dissenting judges considering that even this extension went too far. Lord Keith considered that the absence of any direct relationship between the solicitor and the disappointed beneficiaries precluded a principled extension of the law of negligence. Lord Mustill held that the *Hedley Byrne* principle required actual reliance on the defendant by the plaintiff, and that an imputed, rather than actual, assumption of responsibility by the defendant was insufficient.

47. I have looked closely at the rationale of *White v Jones* because it is the starting point of both Advocates' arguments here, ie the argument both for and against the existence of any duty owed by Dr Ashton to the Plaintiffs personally on the facts of this case.

48. Advocate Ozanne argues that finding such a duty in the present situation is a totally analogous application of the principle which was approved in *White v* Jones. Granting a direct remedy against Dr Ashton to the Plaintiffs to recover the losses which they have suffered by his (allegedly) negligent conduct in allowing/enabling Sir Graham to execute the Wills when he lacked capacity (or when this was, at least, in grave doubt) is necessary, to *"fashion a remedy*" in a case where loss caused by a solicitor's negligence will otherwise simply go uncompensated for lack of one. This she submits was the driving principle of *Ross v Caunters* and *White v Jones* and is equally applicable to this case.

49. Advocate Dawes argues that *White v Jones* is a very limited extension to the law on the existence of a duty of care in tort, and it does not, for good reasons of both legal principle and policy, extend to claims by disaffected former beneficiaries of the testator (as is the case here). Indeed, this can be seen from persuasive authorities in England and in other common law jurisdictions, which have been careful to row back from any such further extension and, indeed, have done so in cases which are effectively on all fours with the present.

Defendant's submissions

50. It is the Defendant's application, so I start with Advocate Dawes' submissions. These are that whilst the solicitor's duty of care has been held to extend to prospective intended beneficiaries who suffer loss through the testator's wishes not

being given effect owing to the negligence of his solicitor in and about carrying out the testator's instructions (as in *Ross v Caunters, White v Jones* and again, similarly, for example, in *Feltham v Freer Bouskell* [2013] EWHC 1952 (Ch)), this is neither analogous with, nor does it extend to, owing a duty of care to those who stand to benefit if the testator does not make a further will, to take care to ensure that such a will is not made at all if the testator lacks capacity, and still less if this may merely be in question. Put the other way, there is no duty owed to the testator's current presumptive beneficiaries to take care to ensure that a testator making a will which will disinherit them does have the testamentary capacity to do so. The existence of any such duty has been considered and rejected in the English case of *Worby v Rosser* 1999 ITELR 59, and similarly in the New Zealand case of *Knox v Till* [1999] 2 NZLR 753 and the Canadian case of *Graham v Bonnycastle* (2004) 243 DLR (4th) 617.

51. In *Worby* the beneficiaries under a 1983 will contested a later (1989) will which reduced their inheritances on the grounds of lack of capacity, want of knowledge and approval and undue influence of a third party. They succeeded, after very lengthy and expensive proceedings and, whilst they were awarded their costs, these turned out to be irrecoverable from the defendant accountant who had stood to benefit from the later will and had been found to have exercised undue influence. They therefore sued the solicitor who had prepared the will, on the grounds that the solicitor owed them a duty to take reasonable care to ensure that the testator had capacity, knew and approved the contents of the will and was not acting under undue influence when he made it. Both the first instance judge and the Court of Appeal held that the claim was misconceived, as no such duty was owed. The short reason given in the report is that the remedy fashioned in *White v Jones* was necessary to fill a *lacuna* which there left disappointed (intended) beneficiaries without a remedy, whilst here there was no *lacuna* because, if the costs of the probate action fell on the estate (as they would in that case, being irrecoverable from the defendant in the probate proceedings) the estate would have a remedy against the solicitor.

52. Chadwick LJ was careful to record that the claim was brought directly against the solicitor, and not on the indirect basis that the estate had been diminished by the costs of the probate action. He did so because, although these costs were in principle (he said) recoverable by the beneficiaries from the estate, they had not been claimed or paid: see 144 D-E. He held that there was therefore no *lacuna* to fill because the estate itself would have a claim against the solicitor (in contrast to *Ross* and *White v Jones)* but Chadwick LJ observed further that

> *"the practical difficulties which would be likely to arise if solicitors were held to owe duties directly to beneficiaries under earlier wills provide powerful support for the view that it would not be appropriate to provide a remedy in circumstances in which it is not needed".*

Gibson LJ observed (150G-151A) that it is not permissible to argue simply from the fact that "but for" the solicitor's drawing up the 1989 will the Claimants would

not have incurred the relevant costs; there must be a duty found to be imposed on the solicitor and that

> "*Still less is it possible to see that there was an assumption of responsibility by the solicitors to such beneficiaries".*

53. In *Knox v Till (*above*),* a precisely similar situation pertained. The beneficiaries under a 1991 will were obliged to spend a large sum in successfully pursuing a probate action to contest the validity of two later wills drawn by the defendant solicitors on the grounds that the testator lacked capacity. Their claim against the solicitors to recover these costs on the grounds of negligent breach of an asserted duty of care to them was struck out. The short judgment of the New Zealand Court of Appeal, delivered by Henry J deserves extensive citation. He said.

> *"(3) The first and important step is to identify the duty of care contended for by the appellants…… Expressed in conventional terms the duty here must be to take reasonable care to avoid loss to the appellants. The loss is that resulting from the execution of the two later wills. The duty therefore must be to avoid the execution of the wills.*
>
> *(4) It is here that the difficulties become apparent and in the absence of any authority to assist the appellants' case it is not surprising. The further duty, was framed ... as being to refuse to prepare a will for execution if testamentary capacity was not established to the solicitor's reasonable satisfaction. No basis for the imposition of such a duty which could still remain compatible with the ordinary features and ramifications of the solicitor/client relationship, was proffered. There is in general an obligation to carry out a client's instructions. In the situation now under discussion no disqualifying factor such as illegality, unlawfulness of breach of ethical responsibilities arises to negate that duty. The giving of advice on a question of testamentary capacity and recording that advice, which would appear to be possible appropriate responses to a situation where capacity is apparently in question are far removed from a positive refusal to act. Furthermore, whether or not a person has capacity is outside the areas of a solicitor's professional expertise. That issue cannot be likened to preparing a will which gives effect to the testator's intentions, and to ensuring it is duly and timeously executed according to law. The implications of the claimed duty are also relevant. What kind of steps are to be undertaken? What right has the solicitor to obtain information which may be confidential to a client? We are therefore not persuaded that policy justifies the imposition of the claimed duty.*
>
> *(5) These difficulties are further compounded. The duty here is claimed to be owed to the beneficiaries of the estate, whoever they may be, at the date of consultation. The court's reluctance to extend a solicitor's duty to persons other than the particular client is well known (Connell v Odlum* [1993] NZLR 37). *The extension of the duty to intended beneficiaries, as recognised in Gartside v Sheffield Young & Ellis [1983] NZLR 37 has no present application. In that situation there is no conflict of interest between*

the testator and beneficiary. Here there clearly is, in two respects. First as between the appellant beneficiaries and the testator client. Secondly as between the appellant beneficiaries and the intended beneficiaries of the proposed wills.

(6) All these factors combine to lead us to the clear view that the claimed duty should not be recognised as sustainable so as to found an action in negligence. The degree of proximity in relationship is too distant; there was no assumption of responsibly by the respondents; the appellants placed no reliance on the respondents; no policy considerations sufficient to justify the imposition of the duty have been proffered. The promotion of professional competence has little if any relevance, let alone significance, in circumstances such as the present."

54. In *Graham v Bonnycastle* (above) a situation very similar to the present arose. The testator's children benefited under a previous will which was superseded by a will in favour of the testator's new wife. It was alleged that the later will was invalid for lack of capacity and probate proceedings ensued. The situation was complicated by the fact that there were also proceedings by the children, commenced a few days before the death of the testator, challenging the validity of the testator's marriage to the new wife. All the proceedings were subsequently settled. The children sued the solicitor who prepared the later will in negligence, seeking the difference in the value of their bequests between the old and new wills, and their costs of the litigation. The Court of Appeal upheld the first instance decision that the solicitor did not owe the Appellants any duty of care. McFadyen J emphasised (at [29]) the strong public policy reasons why a solicitor's duty should not be so extended, namely that

> *"the imposition of a duty to beneficiaries under a previous will would create inevitable conflicts of interest. A solicitor cannot have a duty to follow the instructions of his client to prepare a new will and, at the same time, have a duty to beneficiaries under previous wills whose interests are likely to be affected by the new will."*

She went on

> *"[30] A solicitor must be free to act in the best interests of her client when discharging her duties to make inquiries regarding the client's testamentary capacity without concerns about the interests of others. The decision as to testamentary capacity, which is a difficult one for the solicitor, should not be made more difficult by the unnecessary extension of duties to others. Concerns about lawsuits brought by beneficiaries under prior wills could create the danger that solicitors would decide against the testator's interests in determining capacity, where any doubt arose as to testamentary capacity and previous wills existed. Solicitors may be reluctant to act for elderly testators who wish to change provisions of their will if they may also be liable for damages to beneficiaries under previous wills."*

55. McFadyen J then proceeded at [31] to note the fact that the estate would have a remedy where it suffered loss as the result of a solicitor's negligence and continued.

> *"There is no justification for imposing a duty on solicitors taking instructions for a testator for a new will to protect the interests of beneficiaries under a former will. There is not a sufficient relationship of proximity and there are strong policy reasons for refusing to recognise the existence of a duty. It is not fair just and reasonable to impose a duty."*

56. Citing these cases, Advocate Dawes submits that there can plainly be no distinction between beneficiaries of an earlier will, and beneficiaries who would inherit under an earlier intestacy (which must be right) so that all the above comments are equally applicable to this case.

57. He further submits that the case as here pleaded is in terms which assert, or plainly imply, that the duty which Dr Ashton is claimed to have owed to the Plaintiffs was not to make the Wills, or to permit them to be made, and he submits that this is clearly not a duty which the law recognises, or will impose, relying on the above line of authorities.

58. He then observes that the claim may now be being put slightly differently, so as to get over the above problem and also the problem of conflicts of interest, by being framed as a duty to 'go about' the preparation of the wills in a non-negligent way (this being reference to the steps which Dr Ashton is said to have taken, or not taken but should have taken, with a view to satisfying himself of Sir Graham's capacity) so as to argue that the claim is based on a duty of care which is in harmony with, rather than conflicting with, the contractual duty plainly owed by Dr Ashton to Sir Graham.

59. As to this, he submits that <u>how</u> one goes about a task cannot give rise to a duty; the duty either exists or it does not. Insofar as the proper steps which an advocate taking instructions to prepare a will should take as regards satisfying himself as to the testator's capacity, he refers to the Canadian case of *Scott v Cousins* [2001] OJ 19, where the Ontario Court said

> *"[70] The obligations of solicitors when taking instructions for wills have been repeatedly emphasised in cases of this nature. At the very least, the solicitor must make a serious attempt to determine whether the testator or testatrix has capacity and if there is any possible doubt - or other reason to suspect that the will may be challenged – a memorandum or note of the solicitor's observations and conclusions should be retained on the file…… Some of the authorities go further and state that the solicitor should not allow a will to be executed unless, after diligent questioning, testing or probing he or she is satisfied that the testator has testamentary capacity. This, I think, may be a counsel of perfection and impose too heavy a responsibility. In my experience, careful solicitors who are in doubt on the question of capacity, will not play God – or even judge - and will supervise the execution of the will while taking and retaining comprehensive notes of their observations on the question."*

60. Thus, Advocate Dawes submits, the duty is not to refuse to assist in making a will if there is merely doubt about capacity, but to keep careful and clear records of what happened; in any event, this is no more than a part of the advocate's duty to the testator, and it does not suffice to ground any duty to any other person except the intended beneficiaries under the new will, whose interests coincide with the client's intentions and interests. It does not, therefore, avail the Plaintiffs in this case.

61. With regard to the suggestion that the Plaintiffs have suffered the losses they claimed but have no alternative remedy in respect of these, if they are denied the right to claim under a duty of care owed to them by Dr Ashton, he submits that this is simply wrong. The Plaintiffs have, in fact, already availed themselves of the alternative remedy which the law has recognised as being not only appropriate but adequate, in commencing the probate proceedings and seeking to challenge the will. That was their right, and their right was to seek to vindicate their claim to have the Wills determined to be invalid, with such consequential rights as to obtaining reimbursement of their costs of so doing, if they were successful, according to usual probate practice. How they chose to exploit that right is a matter for them. They chose to settle the proceedings, but that simply means that they have already deployed their available right, and remedy for any supposed loss they have suffered, in a particular way which was their choice. They chose not to proceed to a final determination, presumably after assessing their prospects of succeeding. But that is not a matter for which Dr Ashton can be held accountable, and it does not justify holding that there is a *lacuna* in the law which might (although only in the absence of other objections) justify "fashioning a remedy" by holding that Dr Ashton had owed them some duty, in the circumstances of this case.

62. In summary, he submits that this case is not at all an analogy with *White v Jones* in any material respect; it is an attempt to extend its reasoning to a totally different situation which the authorities show has never been done and should not be done. The proposed duty does not fall within the requirements of a special relationship of necessary proximity, or an assumption of responsibility which are key components for a duty of care in negligence to arise, and there is nothing to make it "fair just and reasonable" to impose a duty. It would therefore be outside legal principle to find any such duty. There are good policy reasons against imposing such a duty, in that it would cause inappropriate and undesirable conflicts of interest for a solicitor, and could have a chilling effect on a solicitor's duty to promote his client's interests and do his best to implement his wishes. And there is no unconscionable *lacuna* in the law to justify imposing any such duty, which was fundamental to the rationale of, even, *White v Jones* itself.

63. Lastly, he emphasises that whilst he has produced several authorities which directly support his submission that Dr Ashton owed no duty to the Plaintiffs as "intestacy beneficiaries" in this situation, Advocate Ozanne, on behalf of the Plaintiffs, can produce no authority directly supporting her case, and has relied instead (he submits) on piecing together fragments from other cases which are not proper parallels, and which do not, ultimately support her case.

Plaintiffs' submissions

64. Advocate Ozanne, for the Plaintiffs, has put her argument at the trial of this preliminary issue rather more subtly than simply advancing the submission that Dr Ashton must be taken to have owed a duty to her clients, as former "intestacy" beneficiaries of his estate (and who would in this case even have been known to him to be such), not to allow Sir Graham to make a will which would defeat or reduce their expectations when Sir Graham did not have capacity to do so, which is how the claim in the Cause appears to be based, at first sight.

65. She first submits that, for the purposes of this hearing, the court must "*treat the alleged breaches of duty, causation and loss to be made out*". That of course, begs the question whether there is any duty to have been breached. However, if it is taken to mean only that the court must treat as made out all the facts alleged in the Cause, (which can then be argued as a matter of submission to found a duty, its breach, sufficient causation and relevant loss in law), it would be correct, and this is accepted by Advocate Dawes.

66. Advocate Ozanne's argument then runs that there are two alternative routes, in principle, by which her clients may obtain redress against Dr Ashton.

67. The first rests on the premise that the Estate is liable to reimburse her clients for their costs of the probate proceedings and also the settlement sum paid to Lady Dorey. (I will call these the "**the Expenses Claims**" for convenience.) She submits that the First Plaintiff would then be entitled as Administrator to claim the Expenses Claims against Dr Ashton on behalf of the Estate, and so the beneficiaries will thus, ultimately, not be without redress, as was the ratio for refusing to find a duty owed to the beneficiaries of the earlier will in *Worby* (above).

68. However, the second route is that if and to the extent that the Expenses Claims are not sums for which her clients are entitled to be reimbursed out of the Estate, they must be able to claim them against Dr Ashton directly in their own right, following the principles of *White v Jones.* This is because, she submits, they will otherwise be left without any possible remedy or redress. That is an unfair and unacceptable *lacuna* in the law, and the law will therefore intervene to fashion a remedy, by recognising the existence of a duty of care on Dr Ashton towards her clients, founding a claim against him. Importantly, she submits that on proper analysis the duty which she relies on is not in conflict with the duty owed by Dr Ashton to Sir Graham, at all.

69. Advocate Ozanne submits that it is very important to bear in mind the very serious and extensive nature of the manifold failings which are alleged against Dr Ashton in the Cause as constituting negligent conduct in and about the preparation and execution of the Wills, and that these facts must be taken as proved for present purposes.

70. She adverts to the duties of advocates and solicitors to exercise due skill and care in the taking of instructions for a will, in particular citing comments of the Ontario Supreme Court in *Hall v Estate of Bruce Bennett* [2003] WTLR 827 at [48] that

> *"it is well-settled that a solicitor who undertakes to prepare a will has the duty to use reasonable skill care and competence in carrying out the*

testator's intentions. This duty includes an obligation to enquire into and substantiate the testator's capacity to make a will. This obligation is of fundamental importance. After all, if the testator does not have the requisite testamentary capacity the preparation of a will in accordance with his expressed wishes at the time may only serve to defeat his true intentions."

This is the duty which is owed to Sir Graham and which she submits not only can, but should by extension, be held to be owed to her clients, if it is necessary to do so in order to give them a remedy for their losses.

71. She then submits that the fact that her clients chose to settle the probate litigation after a mediation, so that there was no actual decision as to the validity (or not) of the Wills, cannot affect the position as regards the availability of a remedy to them, because this would be totally contrary to the strong public policy of encouraging settlement of disputes. If persons in her clients' position could not establish any right of recompense against the negligent solicitor who caused the need for the probate proceedings unless they pursued those proceedings to a final conclusion at great expense, it would produce the invidious result that they could not make a sensible compromise without damaging their rights to indemnification in that respect. That, she submits, simply cannot be right. It would discourage reasonable settlements.

72. Relying on analogy with *Worby,* she submits, therefore, that if the Plaintiffs had pursued the probate action successfully through to trial, then their costs could have been recovered from the Estate under the rule in *Sutton v Drax* (1815) 2 Phil 323 and *Wilkinson v Corfield (*1881) 6 PD 27, and the Estate could then have pursued Dr Ashton in negligence for those costs. The Plaintiffs themselves would thereby have an indirect mechanism for recovering their losses. She submits that it cannot be right that settlement of the probate proceedings should have altered this.

73. She therefore submits that, even when probate proceedings are settled, the litigating beneficiaries must, in appropriate circumstances, be entitled to have their costs, including settlement payments, out of the estate, because it would be perverse if it were otherwise. She accepts, that there must be some test with regard to qualifying expenditure, and that this should be whether the litigating beneficiaries had behaved reasonably in settling. But following on from this, she submits that a claim by the Estate for such losses, ie consequent on its obligation to reimburse the litigant beneficiaries, is a good claim and ought to be allowed to proceed to a trial.

74. Turning, then, to the position of the Plaintiffs' personal claim, she submits that, in the alternative, to the extent that the court may consider that the Estate is <u>not</u> liable to reimburse the Plaintiffs for the Expenses Claims, and therefore does <u>not</u> have a consequential claim against Dr Ashton, the Plaintiffs should (I think this amounts to "*must*") be entitled to bring such a claim against Dr Ashton in their personal capacity, because they otherwise have no remedy at all despite having suffered loss. If the Estate has no claim, the *Worby* argument that there is an alternative remedy available simply falls away. There is therefore good reason to recognise a duty of care between Dr Ashton and her clients and no good reason not to.

75. She argues that the supposed objection that the imposition of any such duty of care would create an unacceptable conflict of interest for the advocate, as between his duty to his client the testator, and the duty suggested to be owed towards the former presumptively entitled beneficiaries of his estate (I shall call them "**former beneficiaries**" for short), is based on a misunderstanding of her case. The duty to her clients for which she contends in fact coincides perfectly with the duty owed by Dr Ashton to Sir Graham himself. It is not a duty 'not to allow a will to be made by a testator who lacks capacity'; it is the advocate's duty to take care and to make properly careful enquiries to satisfy himself as to the testator's capacity, (*see Hall v Estate of Bennett*, and *Scott v Cousins* (both above)), and not to accept instructions unless he is so satisfied. The Plaintiffs aver that, taking the facts in the Cause as proved as one must, Dr Ashton did not perform that duty, and they consequently suffered loss, as it was perfectly foreseeable that they would do, if he did not do so.

76. It was perfectly foreseeable that if he did not take care to assure himself of Sir Graham's capacity, expensive probate litigation between the Plaintiffs and Lady Dorey was likely to ensue and leave them out of pocket. The Plaintiffs' argument is therefore <u>not</u> that a separate duty was owed to them, distinct and different from the duty owed by Dr Ashton to Sir Graham, but rests on the selfsame duty as was owed to Sir Graham. The losses suffered by her clients would not have been suffered "but for" the matters which constitute the negligent breach by Dr Ashton of that duty to Sir Graham. If the Estate has no claim, her clients can gain no redress unless the extension of such duty to encompass them is also recognised, and the situation is thus perfectly within the principles of *White v Jones.*

77. As I understood her argument, Advocate Ozanne also submitted that all these matters were so complex and fact dependent in themselves, having regard to the severity of Dr Ashton's failings which would be proved at a trial but which must be assumed for present purposes, that this made the question of the existence of the duty of care to her clients for which she contended, not simply an issue of law, but an issue of mixed fact and law, which must therefore, go to trial and could not properly be decided as a preliminary issue.

78. The summary of Advocate Ozanne's submissions, at the end of her skeleton argument, was that:

> (1) Dr Ashton's position, that by settling the probate action the Plaintiffs had forgone any right to pursue him, was deeply unattractive,
>
> (2) the Plaintiffs would suffer substantial practical injustice if their claims were disposed of summarily at this early stage of the action,
>
> (3) the Plaintiffs had two alternative routes to redress in that either the court accepts that the Estate is liable to reimburse them for their losses, in which case the First Plaintiff may bring the claim on behalf of the Estate, or (if the Estate is not so liable, which is an issue which might only be capable of determination at a trial) then the Plaintiffs can bring a personal claim of their own following the principles of White v Jones and

(4) the objections to the Plaintiffs' having such a claim disappear when its true nature is understood as being in respect of a breach of duty owed to the testator himself, as set out above.

Discussion and decision

79. The immediate difficulty which I find with Advocate Ozanne's argument lies in its reliance and emphasis on the suggested relationship of this claim by the Plaintiffs personally with the associated possible claim alleged to be available to the Estate. This stems, no doubt, from her recognition that the *Worby* decision, which is somewhat adverse to her case, must either be utilised or distinguished, and that case relied heavily on the reasoning that an alternative route to redress was available, there, to the claimant former beneficiaries through their ability to recover their unpaid costs from the estate, and the consequently depleted estate then having a potential remedy against the culpable solicitor.

80. Advocate Ozanne therefore puts the Plaintiffs' personal claims, which are the subject of the issue here (ie as to the sustainability of any argument that Dr Ashton owed them a duty of care) as being an "alternative" claim, if it is found that the Estate itself does not have any claim against Dr Ashton to recover the Expenses Claims. She appears to accept that if the Estate does have such a claim, this would provide her clients with a sufficient remedy to mean that the qualifying conditions for finding a duty of care towards them to be owed by Dr Ashton are not met. However, and despite my pressing her somewhat, she would not commit herself as to whether she asserted that the Estate did, or did not, have such a claim. She argued that the question whether the Estate does or does not have such a right of recovery against Dr Ashton could only, and therefore must, be decided at a trial, before it can (therefore) be decided whether her clients can claim that Dr Ashton owed them a duty of care. The duty of care is therefore somehow conditional on the resolution of that issue.

81. I find this proposition strange and very unsatisfactory. The issue for decision here is whether, in the current circumstances – or perhaps more correctly, those at the date of the launch of the proceedings – and assuming the truth of the primary facts alleged in the Cause, Dr Ashton owed any legal duty of care to the Plaintiffs at all, in his dealings with Sir Graham in and about the making of the Wills in 2004. It seems to me that such a duty either existed as a matter of law then, or it did not. Obviously it can be said to be "conditional" if that is a reference to the existence or otherwise *at the material time* of a circumstance which is necessary for such a duty to arise, but I do not see how it can be conditional on a matter which only arises later, here (apparently) an eventual determination that the Estate itself is not able to recover the Claims Expenses from Dr Ashton if it pays or is obliged to pay these to the Plaintiffs. This asserted interrelationship with the Estate's position leads Advocate Ozanne to submit that the Estate's claim must therefore go to trial, in order (apparently) to decide whether or not her clients have the cause of action which they can assert as an "alternative".

82. But there is then the further difficulty that this seems to overlook the fact that I have refused permission to the Estate to amend the pleadings to bring any such claim.

In one sense, therefore, it has already been established that the Estate does not have such a claim (at any rate not one that it is capable of being advanced) against Dr Ashton, but as the immediate cause of this is entirely because of a procedural impediment, it does not seem to me to be a fact which can then be prayed in aid as the fulfilment of a substantive condition that there should be no other redress available to the Plaintiffs as a matter of legal principle, to justify the finding of a duty of care owed by him to them. In another sense Advocate Ozanne's arguments lead (as she accepts and even asserts) to the trying of the facts and matters material to a supposed claim by the Estate against Dr Ashton, but not in order to grant any relief to the Estate; rather so as to provide (or not) evidence of the necessary negative precondition for the Plaintiffs to assert their personal claims against him. That prospect is so bizarre and convoluted that it surely cannot be right.

83. Advocate Dawes submits that the basic premise which produces this dilemma, namely that the Estate could have a right to recover the Claims Expenses from Dr Ashton in the present circumstances, is simply incorrect.

84. First, he points out that the Claims Expenses have not been paid by the Estate to the Plaintiffs, yet, in any event. The Estate therefore has no claim against Dr Ashton based on reimbursement. Second, he submits that there is no basis for the assumption, which underlies Advocate Ozanne's argument on this aspect, that the Estate has, or even potentially has, any liability at all to pay the Claims Expenses to the Plaintiffs. There has been no such order against the Estate and there has never been a case for making any such order.

85. The true position, he argues, is that where contested probate proceedings take place and are pursued to a conclusion, there will be a costs order made against the losing party and in favour of the successful party. In that situation there is no loss to either the estate or the winning party. It is only if the losing party fails to pay the winning party's costs that the winning party may be entitled to turn to the estate to recover their costs, (which is what was postulated in *Worby*), and there then could be a claim against the will-drafting solicitor for the loss and depletion thus caused to the Estate by his negligence. Here, however, the probate proceedings have been settled, so there is no basis upon which the Estate could become liable to pay the Plaintiffs' probate litigation costs at all, still less (I think he would add) the settlement sum.

86. I agree with Advocate Dawes' analysis. Whilst the legal principles governing when and how far a successful party in a probate action can recover his litigation costs from the estate were not fully explored at the hearing, I note that the ratio of *Worby* is that the former beneficiaries' general remedy in that case lay in their right to seek to overturn the later will in probate proceedings and that *if they succeeded*, (the actual plaintiffs in that case already had) then *prima facie* their "*unrecovered costs*" (this is specific see [2000] PNLR p 149F) would fall to be recovered from the estate, and it would then be the estate which had the claim, if the solicitor was negligent, to recover those costs from him. This is the ground for holding that there is no need for any direct remedy in favour of the former beneficiaries, and there is no *lacuna* in the law. Whilst the decision in *Worby* might look hard, it was really saying that the plaintiffs there had just gone about things the wrong way.

87. Advocate Dawes' analysis at first might seem to work against his own case for there being no duty of care, in rather supporting the argument that the Plaintiffs do not have an alternative indirect remedy through a claim on the Estate, which can then in turn be made by the Estate against Dr Ashton. However, Advocate Dawes has already dealt with this by submitting that the alternative remedy in the present situation was the right to bring the probate claim to challenge the Wills in the first place, with consequent rights to recover costs if successful, and insofar as the Plaintiffs may have no such remedy now, that is because of their own decision in settling the proceedings.

88. Most importantly, though, and standing back somewhat, it seems to me that the discussion arising from Advocate Ozanne's submissions has now strayed a long way away from the fundamental issue, which is, simply, whether, on the facts of the present case, the relationship between Dr Ashton and the Plaintiffs as former beneficiaries was one which attracted the imposition upon him of a duty of care towards the Plaintiffs in 2004. To my mind, the problem with Advocate Ozanne's approach is that in attempting to grapple with the possible argument that there is an alternative remedy available to her clients, she takes the position of the Estate as a starting point, rather than taking the position of the Plaintiffs' themselves.

89. Examining that fundamental question, therefore, I first record that Advocate Ozanne suggested several times that the perceived problem of Dr Ashton having no relationship with the Plaintiffs which imported a duty of care could be met by the fact that the Plaintiffs were intended beneficiaries under the Wills themselves.

90. In my judgment, this is just not relevant and does not assist her clients. The duty which the Plaintiffs could assert against Dr Ashton on that basis (ie under the principles of *Ross v Caunters* and *White v Jones*) would be a duty to take care to ensure that the benefits conferred on them *under the terms of the Wills* were put into valid effect. This is not what they are complaining about, and is, indeed, almost the contrary of it. The status of "intended beneficiary" is not a gateway qualification which then entitles the Plaintiffs to make any other claim which they can construct; it is the identification of the "special relationship" which justifies finding a duty of care to a person in the particular position of being such an intended beneficiary under the will in question. That is just not this case.

91. I next return to the notable fact that the researches of counsel have produced several reported cases (*Worby*, *Knox*, and *Bonnycastle* (all above)) which have come to the firm conclusion that no duty of care at all is owed by an advocate or solicitor, when taking instructions for the preparation and the execution of a will for a testator, to the persons who stand to benefit from his estate if the will is not made, but those researches have produced no decision which has held to the contrary, ie that any such a duty is owed. (The theoretical possibility that such a duty might be owed in particular circumstances, but not equivalent to this case, was advanced, *obiter* by Berger J in *Bonnycastle*, and I refer to that later.).

92. The extension of a will-drafting solicitor's contractual duty of care to a third party has been held to apply only towards the intended beneficiaries of the new will, and has been based on two significant grounds. The first is the lack of any redress

otherwise available to those persons, if no such duty of care were held to exist, when they suffer clearly identifiable and unfair loss as a direct result of such solicitor's negligent breach of his duty to the testator, to take care to enable the testator to make an effective will in the terms which he desires. The second is the perfect coincidence of the contractual duty owed to the testator by the solicitor and the duty of care suggested to be owed to an intended beneficiary, which means that there is no possible conflict of interest, or similar professional difficulty, caused to the solicitor by finding the existence of such a duty.

93. Advocate Ozanne thus has to argue that the Plaintiffs' claims meet both qualifications; Advocate Dawes submits that they meet neither.

94. I take the second point first. Advocate Ozanne submitted that the postulated duty of care to her clients, is, in reality, perfectly coincident with the duty owed by Dr Ashton to Sir Graham as explained above.

95. If this is correct, then it is somewhat remarkable that this argument does not appear to have been advanced in any of the cases which have found against the existence of any such duty of care. However, if Advocate Ozanne has indeed lighted on a fair formulation of a duty of care which does not raise the "conflict of interest" problem, then her clients' claim could surmount this hurdle. In the end, though, I have concluded that her argument, ingenious though it is, is incorrect.

96. She relies on the fact that an advocate or solicitor is undoubtedly under a contractual duty of care to the testator, to take properly careful steps to seek to assure himself of the testator's capacity to make the will in contention. Expressed simply in terms of the actions which would need to be taken, and enquiries made, in performing that part of his duty, it is right that those steps, and thus the duty as asserted, are the same as those required by the advocate's duty to the client. But this is to ignore the difference in the objective behind the taking of such steps, according to the duty under consideration.

97. The point of imposing any duty of care is: not, by negligence, to cause harm to the object of such duty. The contractual duty here is imposed with a view to ensuring (or, more accurately, to the advocate's assuring himself as best he can) that the testator has capacity, so that the will he makes will be valid. It protects the interests of the testator (and by extension, his intended beneficiaries) in the will being effective: see the formulation of the duty by Farquharson LJ in *White v Jones*, quoted above at [42]. But any duty of care claimed to be owed to former beneficiaries is imposed to protect <u>their</u> interests from harm, and thus it inevitably has the objective of ensuring that no will is made unless the testator does have capacity. This is a different objective, and therefore the focus of the duty being performed by taking appropriate steps to ascertain the testator's capacity is different. The potential conflict of interest for the advocate therefore arises at the next stage, namely what to do in the light of the results of, and information obtained from taking, such appropriate steps?

98. Where the advocate is able to assure himself confidently that his client does have capacity, he has no problem, and where he assures himself confidently that the

client does not have capacity, there is equally no problem. His proper course of action is easy. The difficulties arise where he is just not sure.

99. The basic duty of an advocate instructed to prepare a will, is competently to assist his client to achieve his objective, namely the making of an effective will in the desired terms. If there is doubt as to the client's capacity, then unless that doubt is so great that the advocate does feel that he really cannot have obtained valid instructions, he should proceed on the basis that the instructions are valid, and the testator has capacity, but make comprehensive notes and records as to what he did, what he observed, and what happened. The risk of declining to act, if his client in fact does have the necessary capacity is that his client's legitimate intentions will have been thwarted, and there is also, then, the possibility that his client may not be able to obtain legal advice and assistance which he ought to have been able to obtain. That, to my mind, is more of an evil than the evil that, in a difficult case, a will may have been made for a client who did not, in practice, have the necessary capacity. The process of obtaining probate is designed to enable any such question, if in dispute, to be determined, appropriately, after the testator's death, and the solicitor who implements his client's apparent intentions whilst taking appropriate steps as regards considering capacity, and recording the circumstances in sufficient detail to assist if any subsequent question arises, strikes me as carrying out his professional duties with proper balance.

100. In other words, the proper course is that summed up in *Scott v Cousins* (above) at [70, which I repeat]:

> *"At the very least, the solicitor must make a serious attempt to determine whether the testator or testatrix has capacity and if there is any possible doubt - or other reason to suspect that the will may be challenged – a memorandum or note of the solicitor's observations and conclusions should be retained on the file…… Some of the authorities go further and state that the solicitor should not allow a will to be executed unless, after diligent questioning, testing or probing he or she is satisfied that the testator has testamentary capacity. This, I think, may be a counsel of perfection and impose too heavy a responsibility. In my experience, careful solicitors who are in doubt on the question of capacity, will not play God – or even judge - and will supervise the execution of the will while taking and retaining comprehensive notes of their observations on the question."*

I would agree that the "*counsel of perfection*" there mentioned does, in my judgment, put the standard too high. In cases of doubt the "fail safe" approach (or rather the "fail safer" approach, having regard to the purpose of the advocate's retainer) is to proceed to make the will, with precautions, rather than to decline the retainer.

101. This is where the difference in the nature of the duty to the testator and the nature of the duty to the former beneficiaries proposed by Advocate Ozanne actually lies. The former duty proposes an attitude in favour of preparing the will, if at all possible, whereas the latter duty would entail a "fail safe" attitude in favour of declining to act if at all justifiable. An advocate who was conscious of a possible

duty to former beneficiaries might well therefore be influenced to take a more stringent, or overly cautious attitude to whether the testator had capacity or not than he otherwise would or should, through conscious or even subconscious self-protection.

102. It is for this reason that I do not accept Advocate Ozanne's argument that the duty in favour of her clients which she proposes to exist does not give rise to any problem of conflict of interest for the advocate in question. In practice, I think it most certainly does. This is, to put it bluntly, because the interests of the testator lie in his being enabled to execute his desired will if he possibly can, whilst the interest of the former beneficiaries lie in his not being enabled to execute the proposed will at all. I endorse the comments of McFadyen J in *Graham v Bonnycastle* (above) at [30], which I adopt here:

> *"The decision as to testamentary capacity, which is a difficult one for the solicitor, should not be made more difficult by the unnecessary extension of duties to others. Concerns about lawsuits brought by beneficiaries under prior wills can create the danger that solicitors would decide against the testator's interests in determining capacity, where any doubt arose as to testamentary capacity and previous wills existed. Solicitors may be reluctant to act for elderly testators who wish to change provisions of their will if they may also be liable for damages to beneficiaries under previous wills* ."

103. In my judgment, therefore, the imposition of a duty of care as contended for by Advocate Ozanne does not surmount the public policy obstacles of tending to introduce difficulties and conflicts of interest for an advocate or solicitor called upon to prepare a will, which are clearly placed at centre stage in *Graham v Bonnycastle,* and in *Knox v Till* (above at (4)). I would add that although Chadwick LJ in *Worby v Rosser* appeared to found his decision very much on the availability of the supposed alternative remedy against the estate to recover costs, I do not think his short comment about public policy militating powerfully against the imposition of a duty can be taken to be, therefore, of any less weight.

104. Advocate Ozanne submitted, at one point that the duty of care for which she contended could and should be held to arise if there were "suspicious circumstances" as to whether the testator had capacity, citing *Slobodianik v Podlasiewicz* (2003) 228 DLR 4th 610. Advocate Dawes submitted that this was simply too vague as a supposed test to judge whether or not a duty of care arose. I agree.

105. In any event, *Slobodianik v Podlasiewicz* was a straightforward probate case (where the Court of Appeal reversed the judge's finding that the testator had had capacity) which really concerned the incidence of the burden of proof as to capacity. It was nothing to do with grounds for imposing a duty of care on advocates or solicitors in favour of former beneficiaries. The impact of suspicious circumstances is really dealt with, above, in my consideration of the advocate's duty with regard to considering capacity when taking instructions, and how he should then act. Of course the existence of suspicious circumstances would influence the appropriate steps for an advocate to take as regards evaluating capacity – or any other matter

leading to the validity of the will being potentially questionable – but that is still part of his duty to the testator, and by extension, of course, to the intended beneficiaries, rather than justifying a quantum leap of principle, to impose a duty on the advocate towards former beneficiaries with conflicting interests.

106. For completeness I note that in the above citation which Advocate Ozanne relies on from *Hall vs Estate of Bennett* (above) there appears the warning that

> *"After all, if the testator does not have the requisite testamentary capacity the preparation of a will in accordance with his expressed wishes at the time may only serve to defeat his true intentions.".*

Whilst she did not expressly rely on this, it might be said to suggest an analogy, in favour of *former* beneficiaries, with the recognised extension of the advocate's duty to *intended* beneficiaries, as this is founded on the testator's intentions, thus justifying the provision of a similar remedy for them. However, I read this as merely a throw away comment which cannot bear any such weight. If it is suggested that it can be read as a proposition that the will-drafting advocate or solicitor owes some kind of duty *to the testator* to preserve the existing presumptive testamentary dispositions of his estate unless quite confident that the testator has the capacity to change them, then I reject it. It is the law which provides, for convenience of the administration of inheritances, that the last valid formal will of a deceased person shall be taken to express his true testamentary intentions, but there is no warrant, in practice, for assuming that a person has truly kept those intentions expressed in a previous will (and still less, has positively assented to any statutory dispositions supplied for the case of intestacy) right up to the time when he actually makes a new will or loses capacity. In fact he will inevitably have changed those intentions before he makes an appointment even to give instructions for a new will. This statement therefore can carry no weight as a suggestion of likely fact, and since, *ex hypothesi* in this situation, the postulated testator does not have capacity, he can hardly be supposed to have any "true intentions" at the time at all. The quoted statement I therefore find to be of no force.

107. I turn, therefore, to the second qualifying condition, namely that, if Dr Ashton was negligent, then the Plaintiffs have suffered a loss (ie incurring the Claims Expenses) in consequence of this, and that they have no other remedy for righting this practical wrong.

108. In my judgment, the authorities show that it is, in effect, the right to contest the validity of the later will in probate proceedings, which is regarded by the law as being a sufficient remedy for former beneficiaries who are aggrieved by the execution of a later will where capacity was possibly lacking. This is because, if their grievance is justified, the result of their vindicating this is, also, that they will obtain sufficient potential remedies for recovering any costs incurred (which is then their only loss) and insofar as this affects the estate, and therefore themselves indirectly, or others, this will in principle be adequately met by the estate's consequently having a claim for depletion which it suffers, based on the testator's contractual rights. There is therefore no lack of remedy which causes an injustice to such former beneficiaries, if they are right, which could cause such a major and egregious injustice to such beneficiaries that it would suffice to overcome the

"*powerful support*" (*Worby* at p 149G) of policy considerations militating against the allowing of such a direct remedy.

109. In *Worby* Gibson LJ pointed out that merely because losses had been suffered which would not have been suffered "but for" the asserted negligence, this was not a ground for holding that there was "therefore" a duty of care, a dictum which reinforces my view that the appropriate starting point in considering the matter is the relationship between the suggested plaintiff and defendant, and not the losses allegedly suffered by the plaintiff.

110. In my judgment, therefore, it is the availability of a probate action itself to former beneficiaries who take exception to a later will, which is the essence of the remedy available to them, and means that there is no *lacuna* in the law.

111. I accept that this may be seem to be a somewhat "broad brush" approach, in that the former beneficiaries may possibly be left out of pocket at the conclusion of probate proceedings, even if concluded in their favour, to the extent of the possible non-recovery of their costs in full. However, quite apart from their then possible fall back of having a claim against the estate (and thus giving rise to the estate's own possible claim against the will-drafting advocate or solicitor) it just does not seem to me that this possibility is sufficient to support or justify the finding of a duty of care to former beneficiaries being owed by such advocate or solicitor in the performance of his instructions from the testator. Any such deficit can either be viewed as depending on intervening factors, or as simply being too remote from the alleged negligence, to enable recovery. I consider, however, that the irrecoverability of any such deficit is better and more appropriately viewed as a matter of policy. Former beneficiaries are outside the general principles which found tortious liability, and this kind of possible consequential damage to them is insufficient to justify stretching such principles to include them. The available remedy of bringing a probate action, with routes for reimbursement of the costs thereby incurred <u>if</u> successful (ie if it is shown that this was justified) should be and is considered sufficient even if the outcome in any particular case may fall short of a complete indemnity for costs incurred. It is not every loss or misfortune for which the law provides compensation.

112. I hold, therefore, that the Plaintiffs were not devoid of any alternative remedy if Dr Ashton owed them no duty. Their remedy lay in their right to bring a probate action to vindicate the testamentary position which they contended should pertain (there could be no actionable breach of any supposed duty by Dr Ashton if they did not) and then assert any consequent right to claim costs against Lady Dorey or the Estate. This might (it would depend on findings in the probate action) entitle the Estate to claim against Dr Ashton for its depletion by such probate action costs, but that is neither certain, nor material to the present situation, which is that, in fact, the Plaintiffs have availed themselves of this remedy. There is no *lacuna* in the law which needs to be filled.

113. I turn then to Advocate Ozanne's forcefully made submission that, insofar as her claim was to recover the expenses which her clients have suffered as a result of

bringing but then compromising the probate action, the fact of compromise could not (or should not) deprive her clients of a possible claim against Dr Ashton.

114. Given that I have accepted Advocate Dawes' submissions that, in effect, the Plaintiffs have availed themselves of the alternative remedy which the law affords them as to the claimed invalidity of the Wills, so that there is no *lacuna* of which they can complain, this objection must fall away for having no basis.

115. However I do observe that a similar argument appears to have been advanced in *Graham v Bonnycastle* (above) and that MacFadyen J also regarded the fact of settlement of the probate action as not being a matter which could affect the question whether the Plaintiffs could assert any claim directly against the allegedly negligent solicitor. She said at [27]

> *"If the testator did not have testamentary capacity, the New Will is not admitted to probate and, in the absence of other objections, the Original Will takes effect. Costs properly incurred to challenge probate of the New Will should be paid for by the estate. If the estate thereby suffers loss, it has its own remedy against the negligent solicitor.* ***Here, the beneficiaries commenced such an action but chose to settle the matter rather than have the issue decided. This was their choice."*** (emphasis added).

116. In my judgment the same therefore applies here. It must be a precondition of any claim in negligence against the will-drafting advocate that such negligence can be seen to have caused loss, and in my judgment this is appropriately established, by aggrieved former beneficiaries, by making a successful challenge to the will. The Plaintiffs have compromised away the possibility of having the validity of the will authoritatively determined, with whatever attendant rights to recover their costs might then have been available, but it was their choice to do so, in what they perceived to be their own best interests.

117. As part of her submission Advocate Ozanne argued that it should not, or even could not, be held that compromising the probate action adversely affected her clients' right to recover against Dr Ashton, because this would be contrary to the public policy of encouraging the settlement of proceedings Again, though, in the light of my holding that the alternative remedy lies in the availability of the probate action itself, this objection must fall away, because I am in fact making no such discouraging decision. The fact that the probate action has been compromised does not affect the principle of my decision. If there is no "fall back" cause of action to be possibly pursued by former beneficiaries against the will-drafting advocate on any basis, then such a non-existent possibility can have no effect in encouraging or discouraging the settlement of probate actions. Any compromise will be made on the basis only of the intrinsic merits of the action.

118. Advocate Ozanne also argued that settling the proceedings was a saving of costs and potential court time, which was to be encouraged, and that, in effect, requiring her clients to pursue the probate claim to a final decision in order to recover their losses from Dr Ashton was contrary to this policy, and militated in favour of there being a remedy which would enable them to claim their – thus mitigated – costs

against him. I do not accept this even as a matter of policy, since it would not, in my judgment, amount to a sufficient basis for finding a duty of care if such a finding could not be justified on other grounds. However, the argument also seems to me to fall down as a matter of its own logic. This is because the pursuit of any claim in damages against Dr Ashton where the question of the validity of the Wills had not been determined, would simply require that issue to be litigated, in just the same way as in a probate action - but within the proceedings against Dr Ashton, such that there would ultimately be no such saving. I therefore do not find these arguments to assist the Plaintiffs.

119. For completeness, I should mention here that Advocate Ozanne relied on *Feltham v Freer Bouskell* [2013] EWHC 1952 (Ch) in support of her argument that a party to probate proceedings who compromises them can claim the costs of involvement in, and also paying out in settlement of those proceedings, as damages against the solicitor concerned, if he was negligent That, though, was a case of breach of duty to an intended beneficiary, and not to a disappointed former beneficiary, and such damages were awarded because they represented the loss caused by the particular breach of duty in that case. It was therefore part of a causation argument, and not part of any argument going to the existence of any duty of care. It does not assist the Plaintiffs.

120. Turning finally to review the matter by considering what are often said to be the general principles governing the law of tort in relation to pure economic loss, (see *Caparo v Dickman* (above)) I find that whilst it might be said that economic loss to the Plaintiffs was foreseeable if the claimed duty of care was breached, I am quite satisfied that there was insufficient a degree of proximity between the Plaintiffs and the Defendant to support the existence of any duty of care, even on a *prima facie* basis. There was no assumption of responsibility towards them (quite the opposite in fact) nor anything equivalent. Above all, it is not fair, just and reasonable to impose any such duty on the Defendant, for the reasons discussed above, namely, in my judgment, the important policy considerations with regard to not burdening advocates with potentially conflicting duties, supported by the availability of an alternative remedy or route to reasonably adequate redress, if necessary, which obviates any need to find any duty of care to former beneficiaries.

121. Thus, in the end, I am quite satisfied, and I hold, that Dr Ashton owed no duty of care to the three Plaintiffs such as they contend for, and purport to rely on, in making their claims against him in this case. In fact, I cannot see that there is any situation in which an advocate who takes instructions for, prepares and supervises a will for execution by a testator owes any duty to the persons who would benefit from the testator's estate if no such will were executed, to take care not to allow the testator to make the will unless satisfied that he has testamentary capacity. This is because I consider that the public policy consideration, of the conflict of interest which this would cause, is so strong. This would probably have been sufficient for me to come to my conclusion on its own, but I make my decision on the combined grounds, amply supported by persuasive authority, that not only do such public policy considerations militate against the existence of such a duty, but the prospective plaintiffs are not lacking in a remedy for their situation since they have

one in the availability of a probate action, which protects their legitimate interests sufficiently.

122. I mention, finally, that I am aware that in *Graham v Bonnycastle*, the supporting judgment of Berger J, whilst finding that there was no such duty in the circumstances of that case, proposed that such a duty might arise, in very narrow circumstances, namely that the former beneficiaries only discovered that the will-drafting solicitor had been negligent in treating the testator as having capacity when he did not, after the testator had died, after the later will had been admitted to probate and after the estate had been distributed. In that situation he considered that the solicitor might owe a duty of care to the disappointed former beneficiary because that beneficiary would, indeed, then have no alternative remedy. Whilst this seems to me to be an extraordinarily unlikely scenario in practice,I would in any event disagree with this analysis for the simple reason that, as I have said above, it seems to me that any such duty either exists at the time the will is made, or it does not. One is considering the imposition of a duty of care, not the availability of a claim on an insurance policy. Such a duty cannot be brought into existence by some later happening, or combination of circumstances, and even if the possibility of liability to potentially disgruntled former beneficiaries were small, its mere existence would still have the undesirable effect of giving rise to a potential conflict of duty/interest for advocates or solicitors which I consider to be the all-important reason for declining to recognise any such duty.

Conclusion

123. I will therefore hold in favour of the Defendant on this preliminary issue, that he did not owe any duty of care to the Plaintiffs, suing in their personal capacity as set out in the Amended Cause, and I would propose to dismiss their action, accordingly. I would also propose to do so with costs, on the recoverable basis. If any further or other costs orders are sought by either party, then they should notify me through the court and I will give directions as to how any issue as to costs is to be dealt with.

Her Honour Hazel E Marshall QC

Lieutenant Bailiff

Dated this 9 September 2022