

Appeal against a decision of the Royal Court determined as a preliminary issue that, on the primary facts alleged by the Appellants in their amended Cause, the Respondent (an advocate) had not owed to the Appellants in their personal capacity a duty of care when he took instructions for, prepared, and supervised two wills.

[2023]GCA008

**IN THE COURT OF APPEAL (CIVIL DIVISION), GUERNSEY
ON APPEAL FROM THE ROYAL COURT**

CIVIL DIVISION APPEAL No.564

17 March 2023

BEFORE:

**The Bailiff of Guernsey, President
George Bompas KC
Lord Anderson of Ipswich KBE KC**

Between:

**ROBERT DOREY
JANE PENELOPE MCLELLAND
MARTYN DOREY** **Plaintiffs/Appellants**

and

RAYMOND ASHTON **Defendant/Respondent**

**Advocate Alison Ozanne for the Appellants
Advocate Gordon Dawes for the Respondent**

Bompas JA:

This is the judgment of the Court.

Introduction

- 1 The appeal in this case is against a decision of the Royal Court (Lt Bailiff Hazel Marshall, KC, sitting alone) given on 9 September 2022. She determined as a preliminary issue that, on the primary facts alleged by the Appellants in their amended Cause, the Respondent (an advocate) had not owed to the Appellants in their personal capacity a duty of care when, in the early autumn of 2004 he took instructions for, prepared, and supervised two wills (“the 2004 Wills”), one of personality, the other of realty, for execution by the late Sir Graham Dorey (to whom we refer as “the Deceased”) who died in June 2015.
- 2 It is unnecessary for the purposes of this appeal to set out the detailed procedural history of the litigation between the parties, or the factual background. This can be found in the Lt Bailiff’s judgment (“the Judgment”): she did this “*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*”.
- 3 So far as relevant for this appeal the material facts can be summarised as follows. The Appellants are three of the four children of the Deceased. When the 2004 Wills were made the Deceased, as they contend, lacked testamentary capacity.¹ The dispositions of the Deceased’s estate to be made by the 2004 Wills were disadvantageous from the Appellants’ perspective compared with what was to be the position without those or any other will after September 2004. Broadly speaking, as at the end of September 2004 the Deceased’s estate, had he died then, would have passed on an intestacy to the Appellants along with their sibling, subject to a life interest in realty for the Deceased’s widow. The 2004 Wills were expressed to confer on the Deceased’s widow benefits she would not otherwise have had.
- 4 When the Deceased died, there was an action brought by the Appellants along with their sibling in which the validity of the 2004 Wills was challenged on the basis of the Deceased’s want of testamentary capacity. That action was compromised in about 2018, and the Wills taken to have been effective as made but with the First Appellant becoming the administrator of the Deceased’s estate and with the dispositions made by the Wills being adjusted in favour of the Appellants: in the compromise the Deceased’s widow was paid £375,000, while conveying to the Appellants and their sibling her interest in the house where she resided and renouncing any other claim on the Deceased’s estate.
- 5 The Appellants contend that the Respondent owed them a duty of care as regards the making of the 2004 Wills, and that had the Respondent not been in breach of the duty the 2004 Wills would not have been made. The damages they claim for the breach of duty are legal costs in the probate proceedings (some £146,000), and the £375,000 paid to the Deceased’s widow.

¹ Described in Banks v Goodfellow (1870) 5 QB 545 at 565: a testator must understand the nature of the act of making a will and its effects; must understand the extent of the property of which the testator is disposing; must be able to comprehend and appreciate the claims to which the Testator ought to give effect; and must be free from any disorder of the mind to prevent the exercise of natural faculties in disposing of property by the will.

- 6 This brief summary is sufficient to identify the point at issue on this appeal. Nothing turns on the law of inheritance or wills as it was in 2004 or as it evolved over the years down to the Deceased's death. In her judgment the Lt Bailiff gave sufficient explanation. In principle the 2004 Wills would have been effective as a matter of form and substance, according to the law as it was if the Deceased had been properly able to make them. Also, Advocate Ozanne for the Appellants submits, after 2004 it was practically impossible to have fresh and effective wills made for the Deceased, or to have the wills challenged, before the Deceased's death.
- 7 It is certainly the case that a lawyer drawing a will for a testator client may owe a duty of care in the drawing of the will to a person intended by the testator to be a beneficiary, where the negligence of the lawyer results in the will failing to give effect to the testator's intention. This was first established in English law in the case of Ross v Caunters [1980] Ch 297. In the present case, in contrast, the alleged negligence is said to have disadvantaged, and caused loss to, persons who would have benefitted had there been no will drawn.
- 8 Our brief summary, we would stress, does not detail the very full exposition of facts set out in the Cause, and also set out at length in the Judgment.
- 9 The Appellants' contention in the Cause is that when the 2004 Wills came to be made (a) it was obvious that the Deceased's testamentary capacity was extremely doubtful, and (b) it was known to the Respondent that there were these real doubts.
- 10 The Cause alleges in particular that when the Deceased gave instructions for and made the 2004 Wills he did not have testamentary capacity. Indeed, the Cause sets out 32 matters by reason of which the Respondent "*knew or ought to have known*" of the Deceased's want of testamentary capacity. The Cause specifies 14 failures on the part of the Respondent in what he did towards the making of the Wills. These failures are encapsulated in the final one, this being "*in all the circumstances, to take proper steps to ascertain and satisfy himself of [the Deceased's] testamentary capacity*". The Cause alleges that these failures were negligent, and that "*But for the [Respondent's] aforesaid negligence, the Wills would not have been drafted or purportedly executed*".
- 11 In summary, therefore, the case is that the Respondent owed a duty of care, once he embarked on the task of assisting in the making of the 2004 Wills, to satisfy himself as to the Deceased's testamentary capacity before drafting the 2004 Wills and arranging for their execution. The Respondent does not dispute that such a duty was owed to the Deceased, although there appears to be difference in nuance. On the other hand, the Respondent denies, while the Appellants contend, that the duty was owed to them as well.
- 12 The Appellants submit that at a trial they will have ample material to establish that the Respondent put himself under pressure to "*get the Wills over the line*", without making certain that that was appropriate for an obviously vulnerable and confused individual. In other words, he lost sight of the fact that the 2004 Wills would adversely affect the position of the Appellants as persons the Deceased had previously intended to benefit while he still had

testamentary capacity, not then having made any will to displace what the Guernsey law of inheritance provided for on an intestacy. Indeed, Advocate Ozanne for the Appellants characterises the Appellants as “the true beneficiaries”.

- 13 The trial of the preliminary issue was treated as, in effect, an interlocutory decision on the question whether the Cause disclosed a cause of action in respect of the Appellants’ personal claims against the Respondent. There was no witness evidence given at the trial. Importantly, the Lt Bailiff acknowledged, at paragraph [77], that she assumed the facts in the Cause to have been proved.
- 14 We explain this in deference to the Appellants’ written Case for this appeal, which states that “*whether a duty [of care] arose [is] a matter of mixed fact and law and therefore not appropriate for a preliminary issue*”. The Appellant’s Notice of Appeal did not presage an argument that the Lt Bailiff should not have decided the preliminary issue and instead directed the case to go to a trial. Rather, the contention in the Notice of Appeal is that the Lt Bailiff’s findings on the two key elements (referred to below) were wrong and so that the Lt Bailiff was “*wrong as a matter of law to find that the Respondent did not owe a duty of care to the Appellants as beneficiaries*”.
- 15 We can accept that, if we were satisfied that for some reason without a trial it would be inappropriate to decide the preliminary issue, we would allow the appeal and remit the Appellants’ personal claims to trial. But we reject the Appellants’ contention that the question whether a duty of care existed between the Respondent and the Appellants can only be resolved at a trial. Contrary to Advocate Ozanne’s submission to us, we cannot see the possibility of there being any further evidence at a trial which could improve the Appellants’ prospects of success on the point at issue. What the Appellants have alleged in their Cause, what was therefore accepted by the Lt Bailiff for the purposes of the preliminary issue and is to be accepted for the purposes of the appeal before us, is that the Respondent’s alleged failures in relation to the making of the 2004 Wills for the Appellants were “egregious”, the expression used at the outset of Advocate Ozanne’s Skelton Argument before the Lt Bailiff, and had the result described in the Cause. This is not a case where, from the Appellants’ perspective, there is more to be achieved, as regards findings of fact at a trial, than is before the Court in the form of their Cause treated as established as regards the allegations of primary fact.
- 16 Later in this judgment we refer to JP SPC4 v Royal Bank of Scotland International Ltd [2022] UKPC 18, [2022] 3 WLR 261, a recent decision of the Judicial Committee of the Privy Council on an appeal from the Isle of Man, the question there being whether a bank owed a duty of care to a third party where the third party claimed to have suffered economic loss as a result of the bank’s alleged breach of duty owed to its customer. At the outset of the judgment there was discussion of a challenge to the determination of the question without a trial and on the basis of hypothetical facts. This challenge was rejected. At para [30] of the opinion of the Privy Council given by Lords Hamblen and Burrows, JJSC, it was noted that

“Where all the relevant facts can be identified there is no reason why the issue of law cannot be determined and, indeed, it will often be consistent with the overriding objective of the Civil Procedure Rules ... for that to be done in the interest, in particular, of saving time and costs”. At para [31] it was pointed out that *“There are many precedents for decisions being reached as to whether a duty of care can be established on the basis of assumed or pleaded facts rather than following a trial”.* And at para [32] the decision of the lower courts to proceed to determine the question of law was upheld as the relevant facts as to whether or not a duty of care was owed in law could readily be identified, these facts being the assumed facts.

The Judgment – the Lt Bailiff’s reasons

- 17 In her Judgment the Lt Bailiff set out the material facts at some little length. She then addressed the law. Here she noted that *“There being no Guernsey cases on the point, the Advocates have turned to English and Commonwealth case law for persuasive guidance on the matter ...”.* At this part of her judgment she commented on Ross v Caunters (above) and on the House of Lords case, White v Jones [1995] 2 AC 207, in which (by a majority, Lords Goff, Browne-Wilkinson and Nolan, Lords Keith and Mustill dissenting) the earlier decision was approved.
- 17.1 In the former case a testator’s bequest to a beneficiary failed because the testator’s solicitor had failed to advise the testator properly leading to a beneficiary’s husband witnessing the will, thereby disqualifying her from benefit. The testator’s estate had suffered no loss, not having been depleted, and so had no remedy. Absent an actionable duty of care owed to the intended beneficiary by the solicitor, the solicitor’s negligence would have been without remedy.
- 17.2 In the latter case a solicitor had been dilatory in drawing a will which was to benefit the testator’s daughters in the place of an earlier will disinheriting them. In the period of delay by the solicitor the testator had an accident and died without the intended will being made.
- 18 Also, the Lt Bailiff drew attention to the point (highlighted by Advocate Ozanne for the Appellants in her submissions) that, when White v Jones was before the Court of Appeal, Sir Donald Nicholls V.-C. had followed the approach, explained in Caparo Industries Plc v Dickman [1990] 2 AC 605, of testing whether the case satisfied three requirements for an “incremental” extension to the law of negligence. These requirements are (1) foreseeability of the relevant economic loss; (2) a sufficient connection, in other words “degree of proximity”, between the Respondent and the Appellants to justify the former being found to owe a duty of care to the latter, and (3) that it is not unfair, unjust or unreasonable to impose the duty. Sir Donald acknowledged that finding the solicitor to have owed a duty of care to the disappointed beneficiary could be described as *“fashioning an effective remedy for a solicitor’s breach of duty to his client”.*

- 19 The Lt Bailiff explained that she had given careful attention to all the speeches in White v Jones, not only those of the majority but also the dissenting speeches, because that case is essentially the starting point in dealing with the lines of cases concerned with a lawyer's liability in negligence, as regards the making of a will, to others than the lawyer's client.
- 20 We have been referred to numerous authorities, from various different jurisdictions, on this corner of the law, which is now clear in a case on all fours with Ross v Caunters and White v Jones (above). This situation, the case of the person who should have been benefitted but was not through the failure of a lawyer engaged to make a will, we refer to as a "proposed beneficiary claim".
- 21 On the other hand, we have not been shown any authority covering a case, such as the present, in which a person who has been disadvantaged by a will drawn for a testator of doubtful capacity, or wanting capacity, has successfully claimed damages for negligence against the lawyer drawing the will. This second situation we refer to as a "prior beneficiary claim", recognising that it will include a case where the will can be shown to have been of no effect at all through want of capacity on the testator's part.
- 22 Nevertheless, as to this second situation, the prior beneficiary claim, Advocate Ozanne has drawn our attention to two authorities, one from the Ontario Superior Court of Justice and one from the Court of Appeal of New South Wales, which appear not to have been cited to the Lt Bailiff and which, Advocate Ozanne submits, support her clients' case. These are Vincent v Blake Cassels & Graydon LLP [2013] O.J. No.695(1) and McFee v Reilly [2018] NSWCA 322. We discuss these later.
- 23 A question for us, as for the Lt Bailiff, is whether (as submitted by Advocate Ozanne) a prior beneficiary claim is wholly analogous to a proposed beneficiary claim; or whether (as submitted by Advocate Dawes for the Respondent) the two cases are quite different and that there should be no further extension of the principles in White v Jones from the one to the other.
- 24 A feature of the present case is that the claim of the Appellants is not for the value of the benefits they would have received had the Deceased not made the 2004 Wills. Rather, it is for the costs involved in having the effect of the 2004 Wills adjusted through the pursuit of the probate proceedings and the compromise with the Deceased's widow. The point here, emphasised by Advocate Dawes, is that the present case is to be contrasted with a proposed beneficiary claim, where there is no actionable damage at all for the will lawyer's negligence giving rise to the defective will, unless the disappointed intended beneficiary can claim for the lost benefits.
- 25 In the present case, so it is submitted by Advocate Dawes, the Appellants did have a remedy, namely the ability to contest in proceedings the admission of the 2004 Wills to probate, with the possibility of the Deceased's estate then claiming from the Respondent, for the

Respondent's alleged negligence in relation to the making of the 2004 Wills, the Appellants' costs of the probate proceedings inflicted on the estate and turning out (if that should happen) to be irrecoverable from the Deceased's widow. As it is, the estate has suffered no loss (except, it may be, the wasted expenditure for the Respondent's services in having the doubtful will drawn), as the estate has not borne the costs of the probate proceedings and compromise.

- 26 We return to this point. However, a key consideration which led the courts in Ross v Caunters and White v Jones to decide that a solicitor drawing a will negligently (or failing to use reasonable diligence in drawing a will), such that a proposed beneficiary failed to receive the intended benefit, was that the remedy for the proposed beneficiary filled a lacuna, and that otherwise nothing could be done to reverse or recover the loss of the intended benefit.
- 27 A further, and related, consideration, is that in a proposed beneficiary claim the lawyer's duty to the testator in relation to the drawing of the will is aligned with the duty of care owed to the intended beneficiary: the duty on the part of the lawyer in both cases is to take reasonable care to see that the testator's instructions are carried through in an effective testamentary disposition in favour of the proposed beneficiary. In the prior beneficiary claim, it may be argued, the lawyer's duty to the testator is in conflict with the duty to the disappointed beneficiary in that the duty to the testator, to give effect to the testator's wishes by enabling the testator to make an effective will, is paramount and is at odds with a duty to the disappointed beneficiary to see that the testator does not make a will without testamentary capacity.
- 28 These two features, absence of alternative remedy (or there being a lacuna as to remedy) and absence of conflicting duties, are noted in many of the authorities as conditions needed for a disappointed beneficiary to have a claim against a will-drawing lawyer.
- 29 So, by way of example, in Ross v Caunters Sir Robert Megarry V.-C. summarised the position as follows (p.302-303):

“In broad terms, the question is whether the solicitors are liable, of course, to the testator or his estate for a breach of the duty that they owed to him, though as he has suffered no financial loss it seems that his estate could recover no more than nominal damages. Yet it is said that however careless the solicitors were, they owed no duty to the beneficiary, and so they cannot be liable to her.

If this is right, the result is striking. The only person who has a valid claim suffered no loss, and the only person who has suffered loss has no valid claim ...”

This passage in Sir Robert Megarry V.-C.'s judgment drew attention to the “lacuna”: absent a claim by the disappointed beneficiary, there would be no claim for the solicitor's negligence. As Sir Donald Nicholls V.-C. commented in his judgment in White v Jones at 223: *“I think it must be frankly recognised that, if the court holds a solicitor liable to an intended beneficiary,*

what the court is doing is fashioning an effective remedy for the solicitor's breach of his professional duty to his client", and that this is because "...a coherent system of law demands that there should be a remedy".

- 30 Later in his judgment in Ross v Caunters, as regards the absence of conflicting duty theme (that is conflict between the duty owed to the client and that owed to a third party beneficiary), Sir Robert Megarry V.-C. noted (p.322): *"The duty [to the third party] that I hold to exist in the present case, far from diluting the solicitor's duty to his client, marches with it, and if anything strengthens it"*. This duty to the third party was for the solicitor *"to use proper care in carrying out the client's instructions for conferring the benefit on the third party"*.
- 31 Another illustration of these two features being material is in a Canadian case, Graham v Bonnycastle (2004) 243 DLR (4th) 617, a case in the Alberta Court of Appeal. In his concurring judgment in Graham v Bonnycastle, Berger JA captured the first point by saying (at para [53]) *"Absent a 'lacuna', no remedy will be found to exist"*: in other words a disappointed putative beneficiary can claim no direct remedy against the will lawyer for negligence where there is an alternative route for the beneficiary's loss to give rise to a claim for redress from the lawyer for the latter's breach of duty to the testator client. In the same case McFadyen JA, giving the majority judgment, commented (at para [26]) concerning the alignment of duty condition: *"Courts have consistently refused to extend a duty on solicitors in any other circumstances in which a third-party beneficiary's interests have the potential to conflict with those of the testator/client ... Where the client does not retain the solicitor for the purpose of bestowing a benefit directly on the third-party beneficiary, the requisite proximity for imposing a duty of care is not established"*.
- 32 In the central part of the Lt Bailiff's judgment she described the submissions made to her by Advocate Dawes and Advocate Ozanne and certain of the authorities particularly relied on by each (namely Worby v Rosser [2000] PNLR 140, Knox v Till [1999] 2 NZLR 59, Graham v Bonnycastle (above), Scott v Cousins [2001] OJ No. 19, and Hall v Estate of Bruce Bennett [2003] WTLR 827 at [48]). These we consider later in this judgment, along with others of the numerous cases cited to us.
- 33 In the final part of her judgment the Lt Bailiff gave detailed consideration to the competing arguments, in particular those concerning the two features we have just mentioned, and concluded that:
- 33.1 in the prior beneficiary claim, of which the present is an example, there is no lacuna: there is a remedy available against the negligent will-drawing lawyer, this remedy being at the suit of the deceased's estate for loss suffered when the estate has to pay costs of a probate action;

- 33.2 in a such a case, in contrast with a proposed beneficiary claim, the will lawyer has a duty to the putative testator which would conflict with any duty to the disappointed beneficiary; and
- 33.3 as a matter of principle, applying the Caparo v Dickman considerations, a duty of care owed to the Appellants was not to be imposed on the Respondent.

34 On this appeal the question for us, as it was for the Lt Bailiff, is whether there is a lacuna if the Appellants have no personal action against the Respondent, whether there is a conflict with the undoubted duty the Respondent owed to the Deceased as regards the 2004 Wills and depending on the answers to those questions, whether the Appellants owed to the Respondent a duty of care.

Discussion

35 With this introduction we turn to the parties' respective submissions to us.

36 Advocate Ozanne's argument starts with the proposition that, in contrast with a proposed beneficiary claim, a contract of retainer cannot have been established between the Deceased and the Respondent in relation to the making of the 2004 Wills. In June 2004 the Deceased's children had formed the view that their father was not able to manage his own affairs and had made an application to the court for a guardian to be appointed for their father. In December 2004 a guardian was appointed. The submission is that the Deceased lacked the capacity to engage the Respondent, so that the Respondent had no contractual relationship with the Deceased as regards the 2004 Wills. This is not to say the Respondent owed no duty to Deceased. But the duty that was owed was one arising as simple duty of care in tort. This the Lt Bailiff accepted at paragraph [37] of her Judgment.

37 For present purposes we are content to assume that Advocate Ozanne is correct as to this submission. However, capacity to engage an advocate to provide legal services and testamentary capacity are not the same, so that it does not necessarily follow that a person without the one will be without the other.

38 Advocate Ozanne submitted in her Skeleton Argument before the Lt Bailiff that the Respondent's duty to the Deceased was one "*to exercise proper professional skill and care in carrying out the services he provided*" to the Deceased and "*to take appropriate steps to ascertain capacity*". She further relies on comments of Charron JA, giving the judgment of the Ontario Court of Appeal, in Hall v Estate of Bruce Bennett (above) 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.”

- 39 As the next step in her argument Advocate Ozanne submits that if (as was the case, so the Appellants allege) the Deceased lacked testamentary capacity, in principle the Appellants were and remained his intended beneficiaries, and that therefore the duty of care owed to the Deceased was aligned with one owed to them: it was foreseeable that they would suffer loss if a doubtful will came to be made for the Deceased, in that they would either be forced to engage in expensive legal proceedings in the form of a contested probate action or find that by not challenging the doubtful will they had been deprived of intended benefits which should have come to them. In other words, so Advocate Ozanne submits, there is no conflict between the duty owed by the Respondent to the Deceased, and on the other a duty to the Appellants as intended beneficiaries.
- 40 As the final step in the argument, it is said that the Appellants suffered predictable loss in the form of the costs of bringing and compromising the probate proceedings, these losses not being capable of being pursued by the Deceased’s personal representative on behalf of his estate, which has not had to meet those costs and has therefore not been diminished by them. Insofar as it is argued on behalf of the Respondent that the compromise was the Appellants’ choice, the Appellant contends that compromise should be encouraged as a matter of policy, and that the resulting position so far as the Deceased’s estate is concerned should be found to be analogous to a proposed beneficiary claim where the remedy of the direct action by the proposed beneficiary fills a lacuna. It might be considered that strictly there is no lacuna, because costs of a contested probate action would naturally fall on the estate, with the estate being able to pursue a negligent advocate whose failure led to the incurring of the costs. However, to allow a direct action by a beneficiary against the advocate for the cost incurred would be appropriate with a view to supporting settlement of disputes without the need for trial.
- 41 Advocate Dawes submits that the existence or otherwise of a contract of retainer by the Deceased is immaterial. Either way, the Respondent owed to the Deceased a duty of care. This particular feature of a prior beneficiary claim does not point to a reason for treating such a case as being analogous to a proposed beneficiary claim.
- 42 Advocate Dawes next submits that “*there was self-evidently a conflict between the Appellants and [the Deceased]*”, so that the duty alleged to be owed to the Appellants would conflict with that owed to the Deceased.
- 43 As his third step, Advocate Dawes argues that there was and is no lacuna as to remedy for the Respondent’s alleged breach of duty, not least of all because the actual outcome of the Appellants’ complaints about the making of the 2004 Wills has been a matter of their own choosing and cannot be relied upon to support a second set of proceedings.

- 44 As an introduction to consideration of the cases from different jurisdictions which were cited to us Advocate Dawes reminded us of the principles expressed in Morton v Paint (1996) 21 GLJ 36 at p.51 as clarified by Sir Richard Collas, when Deputy Bailiff, in Helmut v Simon [2010] GRC 04 at [178] to [180]. In the former case Southwell JA had noted that “*in relation to the law of torts it has been customary for the Guernsey Courts to adopt English common law as it has been developed*”. In that case the Court of Appeal was considering whether (as the Court held) in the particular context the common law of Guernsey might be taken to have continued developing when the English common law had been overtaken by statute. In the latter case the Deputy Bailiff identified qualifications to what had been noted by Southwell JA, including that “*English common law is persuasive but decisions of the English courts are not, and cannot be, binding on this jurisdiction*”.
- 45 We note, however, that in Morton v Paint at p.55 Southwell JA, describing the hierarchy of courts and the doctrine of precedent, noted that Privy Council decisions on appeals from other Commonwealth jurisdictions than Guernsey are not binding, but are persuasive authority on the common law where relevant circumstances in Guernsey do not differ markedly from those in the other jurisdictions. English Court of Appeal decisions are to be treated with due respect but are not binding and may be reviewed and departed from if they are considered to be wrong or not appropriate in the particular circumstances of Guernsey.
- 46 Without doubt Advocate Dawes has on his side a clear decision of the English Court of Appeal in Worby v Rosser [2000] PNLR 140 (Gibson, Ward and Chadwick LJ). This was a prior beneficiary claim in which it was held that the lawyer did not owe a duty of care to a beneficiary adversely affected by the making of the doubtful will. It is precisely on all fours with the present case.
- 47 In Worby v Rosser a solicitor had drawn a will which, after a 48-day trial, was refused probate on the ground of want of testamentary capacity, want of knowledge and approval, and undue influence. Instead, an earlier will was admitted to probate. For reasons which are not explained, the trial judge had not made any order for costs out of the estate in favour of the successful plaintiff beneficiaries propounding the earlier will and opposing that which was rejected, although an order for indemnity costs was made in their favour against the beneficiary seeking to uphold the later will; but this order appears to have been fruitless. Those beneficiaries then brought a claim against the solicitor who had drawn the will, alleging that he had owed a duty of care to them as beneficiaries under the earlier will, to take reasonable care to ensure that the testator had testamentary capacity, knew and approved the contents of the will and was free from undue influence. On a trial of a preliminary issue this claim was rejected, the rejection being upheld by the Court of Appeal.
- 48 In his judgment in that case, Chadwick LJ (with whom Ward LJ agreed) pointed out that so far, the testator’s estate had “*not yet suffered any loss because no costs have ... been paid out of the estate, and no claim has been made against it*”. He did, however, explain that ordinarily the beneficiaries seeking to uphold the will held to be the last true will would have

been entitled to their costs out of the estate, in which case the estate would have suffered loss insofar as the costs could be attributable to the negligence of the solicitor. His conclusion was that the claim was “*misconceived*”. His reason, in short, was that in the instant case “*there is no lacuna to be filled*”, and so “*no need to fashion an independent remedy for a beneficiary who has been engaged in the probate proceedings. His or her costs, if properly incurred in obtaining probate of the true will, can be provided for out of the estate. If there has been a breach of duty by the solicitor, the estate can recover from the solicitor the additional costs (including the costs to which the beneficiary is entitled out of the estate)*”. He then remarked that finding a duty of care owed directly to beneficiaries under earlier wills would give rise to practical difficulties, pointing against the existence of such a duty.

49 Peter Gibson LJ agreed with Chadwick LJ that there was not “*in reality, any gap in the law such as would require the court to fashion a remedy to enable the beneficiaries to recover in the present case*”. He dealt (at page 150) in the following way with the point that, as it had happened, the plaintiff beneficiaries had not recovered their costs of the 48-day trial, a point which arises in the present case:

“Of course, if one goes backwards from the fact that the plaintiffs have suffered a loss in that they have not been able to enforce the costs order made in their favour in the probate action (despite the fact that that costs order was on an indemnity basis), one can see that but for the solicitor drawing up the 1989 will, the subject of the probate action, that loss would not have been incurred. That is an impermissible way of finding that there is a duty of care owed by a solicitor to such beneficiaries. Still less is it possible to see that there was an assumption of responsibility by the solicitor towards such beneficiaries.”

50 In short, on the basis of this case, the starting point in deciding whether a duty of care was owed to the Appellants was to see what was to be foreseen in 2004. Breach of duty to the Deceased was not going to be incapable of providing the Deceased’s personal representative with a cause of action for substantial damages: the estate could be expected to incur a material loss in the shape of costs of contested probate proceedings. The existence of a duty of care is not established by showing that a later combination of events avoided such a loss for the estate, leaving it to be borne only by the Appellants.

51 While the Worby case is not binding on us, it is nevertheless persuasive authority. The Court of Appeal held that, there being no lacuna, or remedy gap, to fill, and there being no obvious alignment in duty, it would have been an inappropriate extension of the law to hold that the solicitor owed a duty of care to the disappointed beneficiaries in a prior beneficiary claim. The question now to be considered is whether we should decide that the law in Guernsey has taken a different course.

52 Advocate Ozanne did suggest that the case is to be contrasted with the present, in that in that case it seems to have been accepted, and the Court of Appeal proceeded on the basis that, there had been a contract of retainer between the deceased and the defendant solicitor.

However, we do not see this as giving rise to a material distinction. Whether contractual, tortious or both, a duty of care was owed by the solicitor to the deceased. It was the existence of the duty which matters, not the categorisation. As in the present case, the foundation of the plaintiff beneficiaries' claim lay in the breach of the lawyer's duty to the deceased in undertaking to assist the deceased with a testamentary disposition.

53 The first of the conditions, that of alignment of duties owed respectively to the lawyer's client and to the putative beneficiary (the plaintiff), was an important consideration in the development of the law in Ross v Caunters and White v Jones. So, for example, in Ross v Caunters, a proposed beneficiary claim, Sir Robert Megarry V.-C. said at page 322:

“In broad terms, a solicitor's duty to his client is to do for him all that he properly can, with, of course, proper care and attention. Subject to giving due weight to the adverb 'properly', that duty is a paramount duty. The solicitor owes no such duty to those who are not his clients. He is no guardian of their interests. What he does for his client may be hostile and injurious to their interests ... In a case such as the present there is merely a duty, owed to [the intended beneficiary] as well as the client, to use proper care in carrying out the client's instructions for conferring the benefit on the third party. If it is to be held that there is a duty that is wider than that, that will have to be determined in some other case...”

54 As we see it, the requirement for alignment of the duty to the client with the duty to the beneficiary is to support the need for a solicitor to be able to give single-minded loyalty to the client within the bounds of what is professionally proper. In the proposed beneficiary cases, that duty to the client has been held not to be exclusive so as to preclude a separate duty to a third party, where the duty to the third party is aligned with that owed to the client: that is, the duty to use reasonable care to make an effective testamentary disposition for the client to the benefit of the third party intended to be benefitted.

55 In the present case, however, the assumption is that there was no contract between the Respondent and the Deceased, for the reason that the Deceased lacked capacity to contract as well as lacking testamentary capacity. We have set out above the formulation of the duty owed by the Respondent to the Deceased, as contended for by Advocate Ozanne. But this duty as so formulated leaves open the question whether it is necessarily impermissible for an advocate to supervise the execution of a will for a client (or putative client) where, notwithstanding careful investigation, the advocate just cannot be sure what conclusions as to capacity would be reached if the question of capacity were to be tested in court proceedings. Obviously, this difficulty would be compounded if the advocate were satisfied that the client had capacity to instruct the advocate to advise and assist.

56 As to this, it is accepted on behalf of the Appellants that while the advocate is under a duty to the proposing testator to take appropriate steps to ascertain capacity, the 'fail safe' approach is to assist the proposed testator where the advocate reasonably can. Support for this view of the

advocate's duty is given in a Canadian case cited to us, Scott v Cousins (above) . This was a probate action in which a testatrix was found to lack testamentary capacity to make a contested will. There had been a solicitor involved in the making of the will. At para [70] of the judgment Cullity J explained the duty of the lawyer to try to determine capacity, and also as to record keeping where there were grounds for suspecting a possible later challenge. This paragraph concluded:

“Some of the authorities ... 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.”

57 If the formulation of the advocate's duty given in paragraph [56] above is right, as we think it is, it follows that an advocate approached to assist with a will for a person of doubtful testamentary capacity will owe a duty (and, given the professional duties of an advocate to act in their client's best interests, it must be the primary duty) to the proposing testator client when embarking on the task. Where the duty might lead, in particular whether to a decision to assist, or to refuse to assist, in the making of a will, would depend on the conclusion reached as to the proposing testator's capacity and wishes; but there could properly be a decision to assist in the making of a will where there remained some uncertainty about how a challenge as to capacity would be resolved. Meanwhile, there would be, on the Appellants' argument, a separate duty to the beneficiaries to be disadvantaged by the proposed will not to act in the execution of the will if the testator lacks testamentary capacity; and, on the other hand, a further duty to the proposed beneficiaries under the proposed will to act if the testator has testamentary capacity.

58 It follows, we think, that a prior beneficiary claim is altogether less straightforward, so far as duties are concerned, than the paradigm intended beneficiary claim where the duty of care to the client and the duty to the third-party beneficiary are precisely in alignment. This was the view of the Lt Bailiff: she was concerned that, so far from there being such alignment, there could be duties which were at odds with the primary duty to the proposing testator, and that finding a duty of care owed to third parties could complicate for the advocate what may already be a difficult enough primary duty to the client.

59 We have already noted, in the discussion above concerning the Worby case, reasons for considering that in the present case negligence leading to the making of a will for a person lacking testamentary capacity would not be expected to leave the deceased's estate without remedy.

60 There is a complication, though, with the opposite case, namely the case where the lawyer fails to assist with the making of a will for someone who has capacity to make a will because,

through carelessness, the lawyer fails to take appropriate steps to be satisfied as to that capacity. In theory a disappointed beneficiary might have a direct action for the beneficiary's lost benefit, this being modelled on a proposed beneficiary claim, if a remedy lacuna in such cases could be shown to support the need for a direct remedy. Still there would be two hurdles for the beneficiary to overcome. First, it would be necessary to establish that in fact the intending testator had testamentary capacity. The second hurdle would be to establish that it was the lawyer's refusal to act which then led to the testator's failing to make a testamentary disposition in favour of the disappointed beneficiary, when it might be supposed that the testator could have found some other way of making the disposition; for instance, the intending testator could have sought the help of a different lawyer.

61 As it happens in Feltham v Freer Bouskell [2013] EWHC 1952 Mr Charles Hollander QC, sitting as a Deputy Judge of the English High Court, found in favour of a claimant beneficiary in just such a case as described in the previous paragraph. Although Worby v Rosser was cited to the Deputy Judge, he gave no satisfactory explanation as to why it was not binding on him for the proposition that, because there was no remedy lacuna at the time of the alleged negligence, there could not be found to have been a direct duty of care owed to the claimant beneficiary. We do not think that case to be of any assistance for the question before us.

62 Before us, Advocate Ozanne relies on Carr-Glynn v Fearsons [1999] Ch 326 as showing that the "lacuna" condition is not absolute, and that the possibility of claim on behalf of the deceased's estate for substantial damages arising from the advocate's negligence need not always negate the existence of a duty of care owed to a third-party beneficiary. This case is another decision of the English Court of Appeal, the panel this time being comprised of Butler-Sloss, Thorpe and Chadwick LJ. The leading judgment was given by Chadwick LJ. Thorpe LJ noted, so far as relevant, "*I am relieved that Chadwick LJ concludes that a permissible incremental extension of the holding in White v Jones meets the arguments addressed by [Counsel for the defendant solicitor] and I gratefully adopt his reasoning*". Butler-Sloss LJ agreed.

63 The case involved a claim by a proposed beneficiary of a testatrix. The testatrix was a joint tenant of her home. The testatrix engaged the defendant solicitor to prepare a will leaving her interest in the property to the plaintiff. The defendant drew a will for the testatrix doing just that. However, the defendant negligently failed to advise the testatrix that the disposition would be ineffective unless the joint tenancy was severed, as the other joint tenant would take by survivorship. The testatrix died without having severed the joint tenancy. The plaintiff beneficiary succeeded before the Court of Appeal: reversing the decision of the trial judge the Court of Appeal concluded that the defendant was liable in damages to the plaintiff for the lost share of the property on the basis that the case was analogous to a proposed beneficiary claim.

64 The important aspect of the case for present purposes is that it was assumed as a starting point that the failure of the solicitor to advise of the need to sever the joint tenancy to avoid the

testatrix's interest in the property passing by survivorship led to a loss for the testatrix's estate on her death for which her personal representatives could have a claim for damages. At page 333 of his judgment Chadwick LJ expressed the point as follows:

"At first sight the facts in the present case take it outside the principle as stated by Lord Goff. This is a case in which the estate itself would have a remedy.

The question, therefore, is whether the remedy which the House of Lords was prepared to extend to a disappointed beneficiary in White v. Jones [1995] 2 A.C. 207 is confined to those cases, of which White v. Jones was an example, in which the estate itself has no remedy—so that, absent a remedy at the suit of the beneficiary, there is no remedy at all; or is to be further extended to cases in which the estate does have a remedy but where the estate's remedy will be of no advantage to the disappointed beneficiary.

The judge answered that question in the negative. He said [1997] 2 All E.R. 614, 628:

"It seems to me unacceptable that solicitors should be at risk of two separate claims for identical loss at the suit both of the personal representatives and a beneficiary, when recovery by one would not bar recovery by the other."

I agree. If that were the result which the law required it would properly be regarded as unacceptable and unjust. But, as it seems to me, it ought properly be regarded as equally unacceptable and unjust, if the result which the law requires is that, because of the solicitors' negligence, the loss which the personal representatives are able to recover on behalf of the estate passes to someone who was not the beneficiary intended by the testatrix; leaving the intended beneficiary without recompense. It is, I think, pertinent to keep in mind the observations of Lord Browne-Wilkinson in White v Jones [1995] 2 A.C. 207, 276:

"To my mind it would be unacceptable if, because of some technical rules of law, the wishes and expectations of testators and beneficiaries generally could be defeated by the negligent actions of solicitors without there being any redress. It is only just that the intended beneficiary should be able to recover the benefits which he would otherwise have received."

If the law in this field is to reflect what would generally be recognised as acceptable and just the application of the relevant principles should lead to the result that the estate and its beneficiaries are restored to the position in which they would have been if the solicitors had not failed in their duty to the testatrix."

65 At page 335 Chadwick LJ pointed out that the solicitor's lack of care had failed to ensure that the asset (the interest in the property) fell into the estate on the testatrix's death. He articulated the issue then as follows:

“This important distinction between the facts upon which White v Jones was decided and the facts in the present case requires consideration of two separate but related questions: (i) whether the assumption of responsibility which was held in White v Jones to extend beyond the client to an intended beneficiary in connection with the preparation of a will—extends also to an intended beneficiary in connection with the service of a notice of severance without which the relevant provision in the will cannot take effect, and (ii) whether the assumption of responsibility can extend beyond the client in a case where the estate does have a remedy.”

66 The conclusion was that there was a need to avoid the injustice of imposing double liability on the defendant solicitor in the form of liability to the estate for the lost interest in the property and liability to the proposed beneficiary for that same loss, but that subject to that the position of the proposed beneficiary was sufficiently analogous to that of the proposed beneficiary in White v Jones to support a duty of care. So far as concerned the risk of double liability, Chadwick LJ concluded that an appropriate remedy for the plaintiff could be fashioned by taking the duties to the testatrix and to the beneficiary as complementary and so that to that extent each can only sue for the loss actually incurred by each. In simple terms, the estate would have had no loss, as the interest in the property would have passed to the beneficiary had there been, in conjunction with the bequest to the proposed beneficiary, the severance which the defendant solicitor had failed to advise.

67 This conclusion was expressed by Chadwick LJ at 338 as follows:

“Justice will be done to each of the three interests concerned—the specific legatee, the estate and the solicitors—if solicitors who, in the course of carrying out the testator's testamentary instructions, have failed to take care to ensure that the relevant property forms part of the estate are liable to compensate the specific legatee for the loss which he has suffered as a result of the breach of duty owed to him; and are liable to compensate the estate for the loss (if any) suffered by the other persons interested in the estate for breach of the duty owed to the testator.”

68 The significance of the Carr-Glynn case was that the Court of Appeal acknowledged that the lacuna condition could be satisfied where the remedy gap was as regards the possibility of remedy or redress for the disappointed beneficiary: the beneficiary could not be compensated, absent a direct remedy against the negligent lawyer, whether or not the deceased's estate could have a claim of its own against the lawyer for the same failure, and had no means of reversing or correcting the state of affairs brought about by the lawyer's negligence. So it was that in the Worby case, in the judgments of both Chadwick LJ and Peter Gibson LJ, the lacuna in the earlier case, the lacuna not found to be present in Worby, lay in the fact that without a direct remedy there could be no other remedy for the proposed beneficiary.

69 We would add that we see the Carr-Glynn case very much as a proposed beneficiary claim. Quite simply, despite the arguments about possible double recovery, the reality was that the deceased's estate had suffered no loss, as all that was missed for the estate, in the form of the share of the property which might have been retained on the death of testatrix, was a share which was intended to be devised away from the estate to the intended beneficiary so as then to be hers.

70 In the course of argument, we were referred to two cases decided in the Court of Appeal of New Zealand. In the first, Gartside v Sheffield, Young & Ellis [1983] NZLR 37 the Court had reached the same conclusion in a proposed beneficiary claim as had been reached in Ross v Caunters: the solicitor had failed to prepare with due expedition a will sought by an 89-year-old lady who died before the will had been presented to her for execution. In the second, Knox v Till [2000] PNLR 67, the Court upheld the striking out of a claim by beneficiaries under an earlier will for their costs of a probate action to establish their rights under that will, later wills drawn by the solicitor having been found to be invalid for want of testamentary capacity. The reasoning in the Court's judgment is concise, but in its essentials the decision is on all fours with that in Worby.

71 We have referred already to the Canadian decision in Graham v Bonnycastle. The facts in that case were similar to those in the Worby case, and of course the present. The Court, which had been referred to several of the English authorities (including Worby) dismissed an appeal against a decision that the solicitor owed no duty of care to the beneficiary. This was explained at para [27] of the judgment of McFadyen JA, giving the majority judgment. The majority were clear that there should be no extension to the duty of care found in the Ross v Caunters class of cases, where the will-making solicitor knows of an identified third-party beneficiary intended to be benefitted by the client.

72 Thus, at para [27] McFadyen JA explained:

"... As found by the chambers judge, there is no need to extend the solicitor's duty of care to include the beneficiaries under the Original Will. Those beneficiaries have a right to challenge the New Will on the ground of lack of testamentary capacity. If the testator had testamentary capacity at the time of the New Will, the testator was entitled to do what he did and no loss is caused by any negligence of the solicitor. 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 having the issue decided. That was their choice."

73 Later, in para [31], McFadyen JA concluded: *"There is no justification for imposing a duty on solicitors taking instruction from 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 recognize the existence of a duty. It is not fair, just and reasonable to impose a duty.”

- 74 Advocate Ozanne nevertheless draws attention to the concurring judgment of Berger JA. His conclusion, at paragraph [61], was that in the instant case the beneficiaries were not without remedy so that there was no lacuna to be filled by a direct remedy. But in obiter discussion in his judgment, he relied on the judgment of Chadwick LJ in Worby as being consistent with a case that a disappointed beneficiary might have a direct remedy where a lacuna in remedy was the result of supervening events.
- 75 The difficulty with Berger JA’s judgment is that it is at odds with the majority judgment in the same case on principles to be drawn from the analysis of Worby, and we think is contrary to the decision in Worby, where the way events unfolded was held insufficient to give rise to a duty in the first place. And although in a later Canadian case, Vincent v Blake Cassels & Graydon LLP [2013] O.J. No.695(1), Stephenson J relied on the reasoning of Berger JA to support a decision to refuse a summary judgment application and direct a trial, we do not see this as materially detracting from the force of the majority judgment in the earlier case.
- 76 The final Canadian case before us was Hall v Bruce Bennett (above). In this case a solicitor, not being satisfied as to testamentary capacity when taking instructions for a will, had not gone ahead with the will. He was held by the Court of Appeal of Ontario not to have owed a duty to a third party who had expected to benefit if a will had been made, largely because the solicitor was not held to have owed any duty to the testator to go on with the making of the will once the solicitor had seen the putative testator to lack capacity.
- 77 Before us Advocate Ozanne highlights a comment in the Court’s judgment, that “... *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*”. But that is only to say that for an advocate to assist a person without testamentary capacity to make a will, when to do so is inappropriate, will be a breach of duty to the will-maker; it says nothing about the question whether the advocate owes a duty of care to a third party who will expect to benefit if there is no further will made.
- 78 The second case which was not cited to the Lt Bailiff, McFee v Reilly [2018] NSWCA 322, involved a solicitor assisting in a transfer of land. Years before the owner of the land had made a will disposing of the land to a beneficiary. The solicitor knew of that will. The testator was mentally incapable by the time of the transfer, which was made by his attorney, and which was held to involve her in breach of fiduciary duty. The New South Wales Court of Appeal held the solicitor to have owed a duty of care to the beneficiary, this duty requiring the solicitor to warn against the transfer of the land.
- 79 It is difficult to give much weight to this decision, as Worby appears not to have been referred to, while at para [142] in their judgment the Court of Appeal referred to and distinguished

Graham v Bonnycastle on the basis that, in contrast, the case before the Court “*arises out of a subsequent inter vivos transaction*”, and so that the Canadian case “*tends to emphasise the narrowness of the point in the present appeal*”.

80 The conclusion we draw from our survey of English and Commonwealth cases provided to us by Advocate Ozanne is that the preponderance of authority points against the duty of care to third parties which may be found in proposed beneficiary claims being found to be extended to the present case, a prior beneficiary claim.

81 As mentioned, earlier, in her judgment the Lt Bailiff considered by reference to the principles set out in Caparo v Dickman whether the claimed duty of care might be found. Her conclusion, succinctly stated at para [120], was that it could not:

“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.”

82 Although it appears that JP SPC4 v Royal Bank of Scotland International Ltd was not cited to the Lt Bailiff, we think that that Privy Council decision is compelling authority concluding this appeal. It is difficult to see what circumstances might make that decision appropriate as a statement of Isle of Man common law but not that of the Bailiwick of Guernsey. As we see it, it sets out the applicable test for finding a duty of care in tort in a case of pure economic loss where there is no previous case establishing the duty.

83 We have explained already the context of the decision. That case, like the case before us, involved a claim in tort for negligence purely for economic damage in a context in which there is not yet an established duty of care. It is not sufficient to bring into existence a duty of care to avoid causing or to prevent such loss that the loss was foreseeable as a result of the actions or inaction of the person said to owe the duty. Foreseeability does not amount to proximity as a touchstone: proximity, to be established for the purpose of founding a duty of care, ordinarily needs more. Commonly this is to be found where the person to owe the duty of care is found to have assumed responsibility to the injured party to use reasonable care to avoid the harm.

84 At paras [64] and [65] of the judgment in JP SPC4 the Privy Council explained:

“64. An examination of the case law indicates (see Clerk and Lindsell on Torts , 23rd ed (2021), paras 7-113 to 7-137) that the factors which have been of particular relevance in determining whether there is an assumption of responsibility in relation to a task or service undertaken include: (i) the purpose of the task or service and whether it is for the benefit of the claimant; (ii) the defendant's knowledge and whether it is or ought to be known that the claimant will be relying on the defendant's performance of the task or service with reasonable care; and (iii) the reasonableness of the claimant's reliance on the performance of the task or service by the defendant with reasonable care.

65. In the present case no express assertion of an assumption of responsibility is made in the Amended Particulars of Claim and none of the relevant factors are alleged to be present on the facts. It is not alleged that the Bank undertook to perform any task or service for the Fund or that there were any exchanges crossing the line between them. The only service the Bank undertook to provide was for its customer, SIOM. The Fund and the Bank are not alleged to have dealt with each other at all.”

- 85 The case before us is no different. The only possible feature which might assist the Appellants is the argument that the task undertaken by the Respondent was for the benefit of the Appellants. But if the Respondent was tasked with anything by the Deceased, it was certainly not the task of declining to assist in making the 2004 Wills. Yet, as submitted by Advocate Ozanne, the benefit to the Appellants was to come from the Respondent declining to assist.
- 86 In a section of the Privy Council’s judgment starting at para [69] there was consideration of the appellant’s argument that recognition of a duty of care in the case before the Privy Council would constitute an appropriate incremental development from existing case law. One of the authorities relied on for this argument was White v Jones. The Privy Council explained, at para [71] that that case was founded on the need for practical justice *“to fill the lacuna that would otherwise arise given that the estate which had a cause of action had suffered no loss whereas the intended beneficiaries who had suffered the loss had no cause of action.”* As it was put, *“to fill this lacuna, the law should treat the assumption of responsibility owed by solicitor to its client as extending to the intended beneficiary”*. Then, at para [73] of the judgment, White v Jones was distinguished on the ground that the case before the Privy Council was one where legally the bank’s customer could have sued to recover loss suffered by the appellant third party. *“It is irrelevant”,* the Privy Council explained, *“that, factually, [the customer] is now unlikely as a practical matter to bring an action against the Bank.”*
- 87 As we see, this approach to White v Jones is clear support for the decision in the Worby case. The lacuna sufficient to drive the need for practical justice was because practically there was nothing which as a matter of law either the client (or the client’s estate) or the third party could have done to retrieve the situation for the benefit of the third party resulting from the solicitor’s failure to bring about the benefit. Where there was a remedy (as, for example, a proceeding to prevent a disputed will from being admitted to probate), the fact that the

remedy was lost through compromise, say, would not be sufficient to generate a lacuna which had not existed in the first place.

88 The one possibility noted as an exceptional basis for finding a duty of care in a novel case might be where there was to be, to the knowledge of the person alleged to owe the duty of care, reliance to be placed by a third party on the due performance of the duty. This possibility was noted at para [79] of the judgment of the Privy Council. But that is not the present case.

89 Finally, the point was made that incrementalism as a path for the identification of a novel duty of care is related to the Caparo v Dickman approach of testing whether the imposition of the duty would be fair, just and reasonable: absent a close analogy to an existing established duty in terms of purpose and reliance, and without any legal lacuna of the type found in White v Jones, it would not ordinarily be fair, just or reasonable to find a novel duty of care.

90 In our judgment there would need to be good reason for developing the tort duty of care, in the context of advocates or solicitors assisting with testamentary dispositions, beyond the proposed beneficiary claim line of cases which may now be taken as established and into the area of prior beneficiary claims (using those shorthand expressions as explained earlier). We do not think there is any such reason. On the one hand we do not see that such a duty is obviously needed to remedy an omission in the law. On the other we think that there are real objections.

Conclusion

91 For these reasons we dismiss the appeal.