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UPDATE

JCPC - Lawyer owed no duty to third parties when making wills: *Dorey v Ashton* [2023/0074]

Update prepared by Gordon Dawes and Chantal Barrett (Guernsey)

In a case which had already caught onshore attention, the Judicial Committee of the Privy Council has refused (13 December 2023) permission for the prior beneficiaries to appeal the judgment of the Guernsey Court of Appeal [2023 GCA564] that an advocate (solicitor) owes no duty of care to existing beneficiaries when making new wills for a testator of uncertain capacity. The case makes important statements of general application for tort law liability and is likely to be cited in equivalent circumstances throughout the common law world. Gordon Dawes and Chantal Barrett acted for the successful Respondent.

The facts

The appellant claimants were three of the four adult children of a former Bailiff of Guernsey, Sir Graham Dorey. The respondent advocate made wills of personalty and realty for Sir Graham in 2004, when it was known that Sir Graham had dementia but a consultant psychiatrist had found that he retained testamentary capacity. The claimants challenged the circumstances in which the wills had been made. But for the wills, the children would have received 100% of Sir Graham's estate on intestacy, there being a pre-nuptial agreement between Sir Graham and his second wife, the children's stepmother, which included a disclaimer of any interest in the estate, but permitted the making of wills. By the wills a proportion of Sir Graham's estate was to be given to his second wife. Sir Graham died in 2015. The four children challenged the wills in proceedings against their stepmother. The proceedings were settled for payment of a sum of money to their stepmother, with each side bearing their own costs. The three children then brought proceedings against the respondent advocate to recover their outlay, alleging breach of a direct duty owed to them 'to take proper steps to ascertain and satisfy himself of Sir Graham's capacity' and that, but for his alleged negligence 'the wills would not have been drafted or … executed'. The question of whether the respondent advocate owed any duty of care to the claimants was taken as a preliminary issue and decided at first instance (Lieutenant Bailiff Hazel Marshall KC, [2022] GRC 063) in favour of the respondent advocate.

Court of Appeal judgment

1. The Court of Appeal (The Bailiff, George Bompas KC & Lord Anderson of Ipswich, KBE, KC JJA) upheld the first instance decision and dismissed the appeal with costs.
2. A considerable body of English and Commonwealth authority was cited to and by the Court in its judgment.
3. The Court concluded, citing in particular the English Court of Appeal case of *Worby v Rossiter* [2000] PNLR 140 and distinguishing *Ross v Caunters* [1980] Ch 297 and *White v Jones* [1995] 2 AC 207 that no duty was owed. Unlike the case of a 'proposed beneficiary claim' (the case of a person who should have been benefited but was not through the failure of a lawyer engaged to make a will) [20] there was no lacuna requiring a remedy to be fashioned in favour of the claimants. They were able to challenge the wills with a view to having them set aside; indeed they had pursued that remedy. The fact that the remedy was lost through compromise was not sufficient to generate a lacuna which had not existed in the first place [87]. Furthermore, citing the Lieutenant Bailiff with approval, it was not: '… fair, just and reasonable to impose any such duty on the Defendant, for … 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' [81].

4. The Court relied upon the recent Privy Council decision in *JP SPCB4 v Royal Bank of Scotland International Ltd* [2022] 3 WLR 261 to the effect that where there was a claim in tort for negligence purely for economic damage in a context in which there was not yet an established duty of care it was not sufficient that the loss was foreseeable as a result of the actions or inaction of the person said to owe the duty. Foreseeability did not amount to proximity as a touchstone. More was needed, typically that the person said to owe the duty was found to have assumed responsibility to the injured party to use reasonable care to avoid harm [83].

The claimants sought leave to appeal from the Court of Appeal which was refused. Their application for leave was renewed directly before the Judicial Committee of the Privy Council (JCPC). The application was considered by the JCPC on the papers and refused on the basis that the application did not raise an arguable point of law. That decision marks the end of the claimants' rights of appeal on this issue.

Commentary

The case is an important decision in the context of duties owed by those facilitating the making of wills. The Court of Appeal cited with approval the formulation set out in the Canadian case of *Scott v Cousins* [2001] OJ No. 19: '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 a judge – and will supervise the execution of the will while taking, and retaining, comprehensive notes of their observations on the question'.

The question of whether or not there was a valid retainer, which likewise turned on capacity, was not a relevant consideration given that, in any event, a duty was owed to the (would-be) client. The issue was whether that duty extended to 'prior beneficiaries'.

The case demonstrates Guernsey common law-making as being influenced, but not bound by, English case law whilst looking to the case law of leading Commonwealth jurisdictions for persuasive guidance. It is consistent also with a conservative approach to the creation of novel duties of care more generally.

Contacts

Gordon Dawes
Partner I Advocate
Mourant Ozannes (Guernsey) LLP
+44 1481 731 474
gordon.dawes@mourant.com

Gilly Kennedy-Smith
Partner I Advocate
Mourant Ozannes (Guernsey) LLP
+44 1481 739 397
gilly.kennedy-smith@mourant.com

Chantal Barrett
Counsel I Advocate
Mourant Ozannes (Guernsey) LLP
+44 1481 739 372
chantal.barrett@mourant.com