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## High Court considers scope of duty of care owed by solicitors to third parties

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### Introduction

The High Court has recently considered the nature and scope of the duty of care a solicitor owes an intended beneficiary when drafting a client's will.<sup>1</sup> This case provides useful guidance on the limits of the duty of care owed to third party beneficiaries recognised in *Hill v Van Erp*,<sup>2</sup> and reminds solicitors and their insurers to remain alive to the liabilities that can arise to parties outside of the solicitor-client relationship.

### Background

A solicitor (**solicitor**) received instructions from a client to prepare a will which provided

that the client's entire estate was to be left to Mr Calvert (**Beneficiary**).

The client had a daughter from a previous marriage for whom no provision was made in his will. Following the client's death his daughter brought proceedings under the *Testator's Family Maintenance Act 1912* (Tas) (**TFMA**) and was successful in obtaining court orders for a provision from the client's estate, as well as her costs of making the TFMA claim. The awards substantially depleted the client's modest estate.

The Beneficiary brought proceedings against the solicitor alleging the solicitor had been negligent in failing to advise the client of the

possibility of a TFMA claim and advise on the options available to the client to guard his estate from such a claim.

In the Supreme Court of Tasmania *Blow*, CJ found that the solicitor could have readily ascertained the existence of the client's daughter in circumstances where his firm had drafted two wills for the client in the past, one of which contained a provision for the daughter. *Blow* CJ found the solicitor owed the client a duty to enquire as to the existence of any family members who could make a claim, however his Honour was not satisfied that advice about a possible claim under the TFMA would have triggered an enquiry by the client about how to protect the Beneficiary's position. Ultimately therefore, the Beneficiary was unsuccessful.

The decision was appealed to the Full Court of the Supreme Court of Tasmania. The Full Court allowed the appeal, finding that the solicitor's duty to the client extended not only to a duty to enquire of the client whether he had any children, and to advise of the potential for a claim under the TFMA and the impact of such a claim on his estate, but also to a duty to advise of the possible steps he could consider taking in order to avoid the TFMA claim even if the client did not make any such enquiry. The Full Court reasoned that the duty owed by the solicitor to the client were co-extensive with that owed to the Beneficiary (in his capacity as an intended beneficiary).



## Issues

The matter was appealed by the solicitor to the High Court to determine:

1. Whether the duty owed by the solicitor to the client extended to giving advice on how to protect the Beneficiary's position; and
2. The nature of any duty owed by the solicitor directly to the Beneficiary.

## Decision

### Duty of care owed

The High Court unanimously allowed the solicitor's appeal. The High Court held that the solicitor's duty of care to the client (or the Beneficiary) did not extend to volunteering advice about how to avoid possible claims against the estate under the TFMA or otherwise.

Because the Beneficiary's case was one of a failure to advise the client, the enquiry centered on what should have occurred rather than what did occur. Their Honours found that on receiving the original instructions and observing that no provision had been made for any family member, a prudent solicitor would have made an enquiry about the client's family. Once that enquiry alerted the solicitor to the existence of the daughter, a prudent solicitor would have been obliged to advise the client that it was possible that a claim might be brought against the client's estate pursuant to the TFMA.

The duty did not however extend to providing advice on how to avoid such a claim made by the daughter under the TFMA. The court found that from the solicitor's perspective, it could not be assumed that the client would need such advice.

The High Court rejected the Beneficiary's contention that the solicitor should have volunteered the advice because without further information, he had no reason to



suspect a TFMA claim was likely to be pursued by the daughter.

Ultimately the court found that without anything further, the client's initial instructions regarding preparing the will to benefit the Beneficiary would not have been sufficient to convey to the solicitor that the client would wish to take any lawful step to defeat any future claim that may have been made by the daughter.

### Extending the duty owed to the Beneficiary

The Beneficiary argued that the solicitor had breached the duty of care owed to him in accordance with the principles formulated in *Hill v Van Erp*. The court rejected this argument, finding the limited duty of care owed to an intended beneficiary in *Hill v Van Erp* was not the same as the duty contended for by the Beneficiary, which was one more generally to give advice as to the client's property and future estate.

The court reiterated the principles from *Hill v Van Erp*, which is that a solicitor will generally owe a duty solely to his or her client but there are limited circumstances which a duty of care to a third party can arise. Following *Hill v Van Erp*, in the case of a testator and an intended beneficiary, the interests are coincident and the duty operates consistently with the duty to the client. In the current matter, the court observed that the interests of the client and the Beneficiary as parties to any proposed transactions to defeat the client's daughter's claims were not the same

as those with respect to the execution of final testamentary intentions. The court gave the example of where the client may have changed his mind prior to undertaking any steps that may have defeated a TMFA claim.

### Causation

The court considered that even if it accepted that the solicitor came under a duty to advise the client on how to avoid possible TFMA claims, it did not follow that the client would have followed the advice and took steps to mitigate against any future TFMA claims. Accordingly, the Beneficiary's failed to show that 'but for' the solicitor's failure to give advice surrounding schemes to defeat any future TFMA claims, he would have received the client's estate.

### Comment

While in this case the duty to the client was not breached and the third party failed to establish a breach of any duty owed to him personally, the case does remind solicitors and their insurers that in some circumstances a solicitor's retainer will result in a duty of care being owed to a third party. Solicitors should continue to be mindful of any potential liability arising under their retainers and take appropriate steps as to avoid any unwanted claim.

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<sup>1</sup> *Badenach v Calvert* [2016] HCA 18.

<sup>2</sup> (1997) 188 CLR 159.

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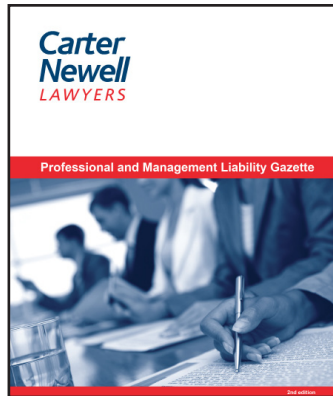


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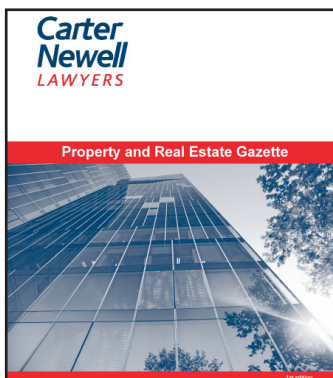
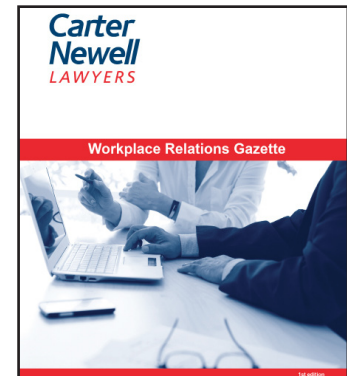
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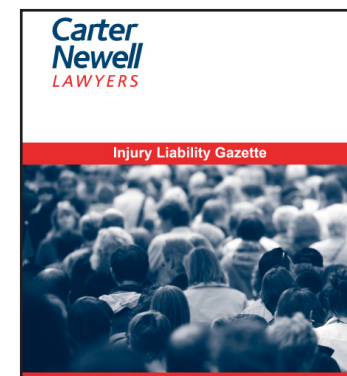
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