IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

CIV-2014-488-129
[2017] NZHC 1209

BETWEEN	CHRISTIAN JOHN GILLIBRAND AND MARY CAECILIA GILLIBRAND AS TRUSTEES OF THE CHRIS AND MARY GILLIBRAND FAMILY TRUST First Plaintiffs
	CHRISTIAN JOHN GILLIBRAND Second Plaintiff
AND	GEORGE PETER SWANEPOEL First Defendant
	ANDREW PETER HOLGATE Second Defendant
	CHRISITAN JOHN GILLIBRAND AND MARY CAECILIA GILLIBRAND Third Parties

Hearing:	29 February, 1, 2, 3, 4, 7 and 8 March 2016 and written submissions 13 and 17 March 2016
Appearances:	C T Patterson and H P Holland for the First and Second Plaintiffs and Third Parties H M Twomey and S M Watson for the First Defendant Second Defendant in person
Judgment:	6 June 2017

JUDGMENT OF WOODHOUSE J

This judgment was delivered by me on 6 June 2017 at 4:00 p.m.
pursuant to r 11.5 of the High Court Rules 1985.

Registrar/Deputy Registrar

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Solicitors / Counsel:
Mr C T Patterson, Barrister, Auckland
Ms H Twomey, Robertsons, Solicitors, Auckland
Mr A Holgate, Barrister, Whangarei

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Introduction

[1] The first plaintiffs, Christian and Mary Gillibrand, sue as trustees of the Chris and Mary Gillibrand Family Trust (the trust). The second plaintiff, Christian Gillibrand, sues in his personal capacity. The plaintiffs claim that the first defendant, George Swanepoel, and the second defendant, Andrew Holgate, are liable to them for breach of duties of care owed to the plaintiffs when acting as a solicitor and a barrister respectively.

[2] The plaintiffs claim that Mr Swanepoel is liable to them for losses incurred as a result of breach of duties of care owed to them when acting in respect of the following:

(a) From 2009 to April 2015 on a claim by Bupa Care Services Ltd (Bupa) for resthome fees incurred by Christian Gillibrand's father, Gordon Gillibrand, up to the date of Gordon Gillibrand's death in April 2011. The claim was initially made against Gordon Gillibrand and then against his estate.

(b) An application by Bupa, made in December 2012, to remove Christian Gillibrand as sole executor of his father's estate because of alleged conflicts of interest.

[3] I will, for convenience, refer to Christian Gillibrand as "Mr Gillibrand" and to his father as "Gordon Gillibrand".

[4] Against Mr Holgate the plaintiffs claim that they suffered losses as a result of breaches of duties of care owed to them when Mr Holgate acted as counsel, on instructions from Mr Swanepoel, in respect of Bupa's application to remove Mr Gillibrand as executor and then on proceedings issued by Bupa to recover the debt for resthome fees.

[5] There were protracted negotiations with Bupa, and then proceedings by Bupa, in its efforts to recover the fees and interest and, at a later stage, legal costs. There were two issues central to resolution of Bupa's claim for the resthome fees.

One was whether a debt owed by the trust to Gordon Gillibrand had been forgiven. This was central because, if no debt was owed by the trust to the estate, the estate was insolvent. The second issue was whether Bupa had been negligent in its care of Gordon Gillibrand and, if so, whether this provided legal grounds for resisting Bupa's application to remove Mr Gillibrand as executor and Bupa's claim for the resthome fees and other costs.

[6] Bupa's application to remove Mr Gillibrand as executor of the estate was on the grounds that there was a conflict between, on the one hand, his personal interests as the sole beneficiary of the estate and as one of the trustees and beneficiaries of the trust which had an apparent debt to the estate, and on the other his obligation to recover the debt apparently owed by the trust to the estate in order to pay estate debts.

[7] Matters relating to Gordon Gillibrand's estate were eventually brought to an end following two court hearings. In August 2013, on Bupa's application to remove Mr Gillibrand as executor, an order was made removing him. In November 2013, in that proceeding, there was a further order that he pay Bupa's costs, with part of those costs being on an indemnity basis. Bupa's total claim for outstanding resthome fees, with interest, and for costs, was settled by payment of $150,000 by the estate to Bupa. When Gordon Gillibrand died the debt for resthome fees was approximately $45,000. The funds to pay Bupa had come from the trust in partial satisfaction of the trust's debt to Gordon Gillibrand. In addition, the estate paid interest on legal fees that had been incurred by Gordon Gillibrand, and almost $23,000 in fees incurred in the administration of the estate by the new executor, Stuart Henderson, a Whangarei solicitor. These sums were also paid from funds recovered by the estate from the trust.

[8] The claims of the first and second plaintiffs are in the alternative, with the primary claim being that of the first plaintiffs as trustees. The trust contends that the alleged negligence of each of the defendants has caused loss because that negligence resulted in the trust paying to the estate more than what would have been required

had there been no negligence.[1] A question whether the claims of the plaintiffs are in contract or in tort is discussed below. In this proceeding it is unnecessary to consider any differences between a claim in contract and one in tort. The essential basis for Mr Gillibrand's claim in his personal capacity is founded on the fact that he is the sole beneficiary under his father's will and that, as a consequence of the alleged negligence of the defendants, his entitlement as beneficiary has been diminished because the estate paid more than would have been required if there had been no negligence.

The factual background

[9] There was a large number of facts in issue. Many of these were on matters which I have concluded are not relevant. In general, I do not intend to record these matters or my reasons for concluding that they are not relevant because it would add unnecessarily to the length of this judgment.

[10] The factual narrative that follows records many statements of fact where, again, there was conflicting evidence. Some of the important conflicts of evidence are identified and, where necessary, with reasons for my particular finding of fact, but I have not considered it necessary to go into the detail in respect of all matters of this nature.

[11] Although there are the separate claims of Mr and Mrs Gillibrand as trustees and of Mr Gillibrand in his personal capacity, I will generally refer to them collectively as "the plaintiffs", or as "Mr and Mrs Gillibrand", unless a clear distinction between the capacities in which they have brought these claims is necessary.

2003 to Gordon Gillibrand's death in April 2011

[12] Mr Gillibrand is the only child of Gordon and Freda Gillibrand. Mrs Freda Gillibrand died in 2000. In 2003 Gordon Gillibrand suffered a stroke. He required 24 hour care and support and in May 2003 was admitted to a resthome owned and operated by Bupa. Gordon Gillibrand granted a power of attorney to his son.

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[1] I will use the word "negligence" to refer to a breach of a duty of care owed in contract or in tort.

[13] Gordon Gillibrand owned a farm. In December 2003 he sold the farm to the trust for $505,000 and advanced the total purchase price to the trust as a loan. The principal sum was payable on demand, with a proviso that demand could not be made within seven years of the date of the advance. I will refer to this as "the trust debt".

[14] Until November 2004 Gordon Gillibrand paid the resthome fees but, it appears, from that date he had no funds under his control to continue the payments. From November 2004 until around the middle of 2008 the resthome fees were paid by the trust. The sums paid by the trust were credited as repayments of the trust debt. A total of $150,000 was paid.

[15] From around the middle of 2008, or at least by 2009, the trust had no material assets, other than the farm, to make further repayments to Gordon Gillibrand and enable continued payment of resthome fees. In addition, the personal financial circumstances of Mr and Mrs Gillibrand meant that it would have been difficult for them personally to make any payments that could be used to meet the resthome fees (whether indirectly by loans through the trust or directly to Bupa). The trustees were also reluctant to borrow in order to make payments to meet the resthome fees. Mr Gillibrand's evidence was that in 2009 their "financial situation became very difficult". This was made materially worse in March 2012 when Mrs Gillibrand was seriously injured in a car accident.

[16] Mr and Mrs Gillibrand first spoke to Mr Swanepoel about the problem with the resthome fees in December 2009. At that date Mr Swanepoel was already acting for the trust in relation to a lease over the farm. Mr Swanepoel gave them some preliminary advice, with options. The option the plaintiffs were keen on pursuing was to investigate whether Gordon Gillibrand could obtain a WINZ subsidy.

[17] Up to that date the solicitors generally acting for the Gillibrands were solicitors in Dargaville, Hammonds. The Gillibrands gave authorities to Mr Swanepoel for him to uplift their personal files, the trust files, and Gordon Gillibrand's files from Hammonds.

[18] A formal letter of engagement was sent by Mr Swanepoel to Mr Gillibrand in February 2010, and was signed and returned by Mr Gillibrand in April 2010. It was addressed to "Chris Gillibrand". The subject matter of the letter of engagement is "resthome subsidy – Mr Gillibrand senior". There is nothing else in the letter of engagement which records the scope of the instructions or indicates who Mr Swanepoel was acting for.

[19] Mr Swanepoel described his legal practice as "a general practice, which was suitable for Whangarei". He said:

> The main part of my practice comprised conveyancing, trust, family and employment law. I also practiced some commercial law, in particular drafting leases and agreements for sale and purchase of businesses. In the context of some family law matters, some of the employment files and some minor commercial matters, I appeared in court on occasion but I did not consider litigation to be the main thrust of my practice, preferring to resolve disputes by negotiation or mediation. I generally briefed a specialist barrister on larger, complex or serious litigation as I did not consider litigation to be my area of expertise.

[20] I accept Mr Swanepoel's description of the general nature of his practice, and notwithstanding contentions for the plaintiffs that Mr Swanepoel had a reasonable amount of relevant litigation experience.

[21] Up to February 2010 Bupa had been in communication with Mr Gillibrand, from time to time, seeking payment of the outstanding fees or alternative proposals to deal satisfactorily with the matter. On 12 February 2010 Bupa's resthome manager, having earlier obtained a medical assessment of Gordon Gillibrand's mental competence, obtained from Gordon Gillibrand a signed revocation of the power of attorney in favour of his son. This was followed with preliminary advice from Bupa, to Mr Swanepoel, that the Public Trust Office was to be engaged to advise Gordon Gillibrand and that there was a possibility that Gordon Gillibrand might have to be evicted from the resthome. However, in March 2010 a Whangarei solicitor, Stuart Spicer of Webb Ross, was instructed to act for Gordon Gillibrand, and in particular to provide advice as to how the resthome fees could be paid.

[22] From March 2010 there was a number of written communications between Mr Spicer and Mr Swanepoel, and Mr Spicer and Mr Gillibrand personally. Mr

Spicer also had a meeting with Mr Gillibrand and Mr Swanepoel to discuss means by which Bupa's fees could be paid, including further repayment of the trust debt. The liability of the trust to Gordon Gillibrand was a matter into which Mr Spicer enquired in some detail. Mr Spicer sought financial information relating to the trust from Mr and Mrs Gillibrand. In due course Mr Spicer was provided with a copy of the financial statements for the trust for the year ended 31 March 2010. These recorded the trust debt at $355,000; a balance derived from the original loan to the trust of $505,000 less repayments made by the trust of $150,000 to enable Gordon Gillibrand's liability to Bupa to be met.

[23] Through to April 2011 different proposals were put forward, both by or on behalf of Mr and Mrs Gillibrand, and by Mr Spicer on behalf of Gordon Gillibrand, with the ultimate objective of providing Gordon Gillibrand with assured capacity to pay the resthome fees. The alternatives do not need to be outlined, other than the final offer made before Gordon Gillibrand died, by Mr Swanepoel on instructions from Mr and Mrs Gillibrand.

[24] The final offer is recorded in a letter of 8 April 2011 from Mr Swanepoel to Bupa. This letter was in response to a letter from Bupa directly to Mr Gillibrand demanding payment of the total of the Bupa debt. Mr Swanepoel had a meeting with Mr and Mrs Gillibrand at the beginning of April 2011, drafted a letter to Bupa, and obtained the authority of the Gillibrands to send the letter. The letter, so far as relevant, contains the following:

> I refer to your letter dated 28 March 2011, which my clients have handed to me …
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> What my clients propose is the follows:
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> 1. They accept that there is a debt owing back to Mr Gillibrand Senior by the Chris and Mary Gillibrand Family Trust of $355,000.00, as a result of the purchase of the family farm from him some time ago.
>
> 2. To assist with the obtaining of assistance from WINZ my clients, on behalf of the trust are now in a position to transfer to Gordon a property situated at Waihue Road, Waihue … which currently has a capital value of $365,000 …
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> 3. It is then envisaged that a charge can be obtained over that property in favour of WINZ from Gordon which will then secure the payments to you of the outstanding amounts.

Gordon Gillibrand's death to the removal application: April 2011 to August 2012

[25] Gordon Gillibrand died on 15 April 2011.

[26] The proposal in Mr Swanepoel's letter to Bupa of 8 April 2011 had not been accepted before Gordon Gillibrand died, and it was not modified following his death to become an arrangement between the trust and Gordon Gillibrand's estate.

[27] Following Gordon Gillibrand's death Mr Swanepoel was instructed to act for Mr Gillibrand as executor of Gordon Gillibrand's estate. Mr Swanepoel sent Mr Gillibrand a letter of engagement, which Mr Gillibrand signed. This was expressly directed to instructions from Mr Gillibrand to Mr Swanepoel "to act in the matter of your late father's estate". The letter is addressed to "Estate of G J Gillibrand, C/o Mr Chris Gillibrand". The subject matter is "Claim by Bupa Care Services New Zealand Limited".

[28] The estate had only two debts; or at least only two referred to in the evidence and only two of any relevance. One was the debt to Bupa which, on Gordon Gillibrand's death, was just under $45,000, a sum which included interest on the fees. The other debt was $8,174.50 owed to Webb Ross for Mr Spicer's services up to the date of Gordon Gillibrand's death. The only apparent asset of the estate available to pay the Bupa and Web Ross debts was the trust debt.

[29] Probate of Gordon Gillibrand's will was granted in July 2011. Between that date and August 2012, when Bupa filed its application to remove Mr Gillibrand as executor, no progress was made in resolving issues relating to the Bupa debt, notwithstanding steps to that end taken by Mr Swanepoel on behalf of the Gillibrands, in accordance with instructions I am satisfied he got from them. It is necessary to refer only to a relatively small number of matters referred to in the evidence in relation to this period.

[30] In September 2011, accountants acting on instructions from Mr and Mrs Gillibrand for the trust produced the financial statements for the year ended 31 March 2011. These again recorded the trust debt at $355,000. The Gillibrands did

not provide Mr Swanepoel with copies of these financial statements, or even refer to them, until a considerable time after they were produced.

[31] There was an email from Mr Swanepoel to Bupa on 21 December 2011. Bupa had enquired whether the offer made in Mr Swanepoel's letter of 8 April 2011 was still on the table. Having taken instructions from Mr Gillibrand, Mr Swanepoel sent an email to Bupa's representative, with a copy to Mrs Gillibrand, as follows:

> … I have Spoken to Chris and looked at the letter attached which was a proposal put forward by clients to try and assist with obtaining a loan or subsidy to pay Gordon's accounts. The offer in the letter was never acknowledged or accepted by Bupa. Nor was it approved by all the trustees of the family trust as it was purely a proposal. Obviously once Gordon passed away it no longer applied and it was for Chris as executor to make a decision on. In my discussion with Chris he is still very upset about the way Darryl [Bupa's manager at Gordon Gillibrand's resthome] went about terminating his power of attorney and the stress he put Gordon under as a result for which Chris has had no acceptance of any wrong or apology.
>
> He has approached the other trustees of the trust[2] but they are correctly pleading the statute of limitations apply and they have an obligation to the beneficiaries of the trust to protect the trust assets …
>
> …
>
> The bank accounts [of the estate] have rendered no funds and we are holding nothing in trust so the estate is bankrupt. It is my recommendation that Chris administers the estate pursuant to Part 17 of the Administration Act 1969.

[32] This was the first indication to Bupa, by or on behalf of Mr and Mrs Gillibrand, that there was some issue as to whether the trust debt was still recoverable. I accept Mr Swanepoel's evidence as to the instructions he received from Mr Gillibrand which resulted in that email. Mr Swanepoel said:

> I discussed [Bupa's enquiry about the 8 April 2011 offer] with Chris, including the fact that now he was in [a] position to put the property on the market, sell it and pay the Bupa Debt. Chris was adamant that he did not want to do that and maintained that there was no way to finance payment of the Bupa Debt at that time. In accordance with his instructions I raised the Insolvency Arguments.

[33] It is convenient to record at this point that there was criticism in submissions for the plaintiffs of the legal arguments advanced in that email and which Mr

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[2] There was a third trustee, Mrs Gillibrand's brother. He resigned as a trustee in November 2013. There was no evidence from him in this proceeding.

Swanepoel acknowledged were arguments he advanced. The arguments can be challenged. And the reference to the Administration Act was wrong; it should have been a reference to the Insolvency Act. But these submissions for the plaintiffs do not point to any breach by Mr Swanepoel of any duty of care he owed to the plaintiffs. He was complying with his instructions in seeking to construct arguments to support Mr Gillibrand's primary objective, which was to avoid having to sell the farm.

[34] On 30 January 2012 Bupa's solicitors, Gibson Sheat, wrote to Mr Gillibrand as executor. Amongst other things, they challenged the propositions in Mr Swanepoel's email of 21 December and said that, in their view, the trust debt was owing, and referred to Mr Gillibrand's duty as executor to collect the assets of the estate and pay all debts. Mr Swanepoel took instructions from Mr and Mrs Gillibrand. He was at the same time acting for the trust on a new bank loan that had been obtained for a new house. Mr Swanepoel recommended to Mr and Mrs Gillibrand that they use part of the proceeds of the loan to repay the Bupa debt. He also advised them that failure to pay the estate's liabilities at that stage could only lead to further costs being incurred. Mr and Mrs Gillibrand were determined that all of the available funds should be put towards the new house. Also at this time, during February 2012, they told Mr Swanepoel for the first time that the trust debt had been forgiven by Gordon Gillibrand. I accept Mr Swanepoel's evidence. His evidence included a statement that he "was amazed this was not raised on the numerous occasions earlier when the [trust debt] had been discussed and in particular when Gordon was alive so that steps could have been taken to obtain the necessary confirmation".

[35] Having taken instructions from Mr and Mrs Gillibrand on these matters, Mr Swanepoel prepared a draft of a response to Gibson Sheat's letter to Mr Gillibrand. The draft was approved by Mr and Mrs Gillibrand. The final version sent by Mr Swanepoel to Gibson Sheat on 2 March 2012. Matters of relevance are:

(a) Mr Gillibrand was "fully aware that there is a debt between Bupa and his father's estate".

(b) There was a challenge to Gibson Sheat's interpretation of Mr Swanepoel's letter to Bupa of 8 April 2011 as an acknowledgement that the trust was indebted to Gordon Gillibrand in a sum of $355,000. Contentions advanced by Mr Swanepoel in support of this position were that the 8 April 2011 letter referred to the need for a resolution of the trustees, and that the proposal for the trust to transfer the Waihue Road property to Gordon Gillibrand was made by Mr Gillibrand simply to assist Gordon Gillibrand "purely out of love for his father … not because he believed any debt was owed".

(c) Further arguments were advanced to the effect that there was no debt owed by the trust to the estate and reference to a need for the trustees to act unanimously. It was stated that the trustees of the trust refused to recognise a debt to the estate and believed that the acknowledgement of debt had expired, and they had been advised to take independent legal advice in that regard.

(d) Mr Gillibrand's view, as executor, was that the estate was insolvent.

[36] Mr Swanepoel's evidence was that, although he drafted the letter, the contention that the estate was insolvent was not based on his advice to the Gillibrands, and that, contrary to the plaintiffs' contentions, he did not advise them that the trust was not indebted to the estate for the trust debt. He said that for these reasons he expressly recorded in the letter that the proposition that the estate was insolvent was "the view of Mr Gillibrand" and noted his advice to the trustees to take independent legal advice. I accept Mr Swanepoel's evidence in this regard.

[37] In March 2012 the Gillibrands were involved in a motor vehicle accident and Mrs Gillibrand was seriously injured. Mrs Gillibrand was incapacitated for an extended period. This added materially to the financial difficulties of the Gillibrands.

[38] In August 2012 Bupa filed its application to remove Mr Gillibrand as executor because of a conflict of interest. Mr Gillibrand provided a signed letter of

engagement to Mr Swanepoel for Mr Swanepoel to act on the removal application. A notice of opposition and an affidavit of Mr Gillibrand in support of the opposition were filed in October 2012. I will refer to the opposition as "the first opposition" and to the affidavit as "the first affidavit".

The first opposition and first affidavit

[39] The relevant content of the first opposition was that the estate had no funds to pay the Bupa debt and that Mr Gillibrand, as executor, had an absolute discretion to postpone the sale and conversion of any real and personal property of the estate. Although the document was in form an opposition to the removal application, the opposition did not contain an assertion that there was no conflict.

[40] The absence of any direct challenge was taken further in the first affidavit. Mr Gillibrand's first affidavit included the following:

(a) It was his understanding and agreement with his father that demand for the trust debt would never to be made.

(b) He had approached the trustees of the trust with regard to the Bupa debt and "they reminded me of the promise that the debt was not to be called up".

(c) His relationship with Bupa had been "an unhappy one" and he believed that Bupa in large measure was responsible "for the situation that they find themselves in".

(d) In January/February 2010 the Gillibrands were having some financial difficulties, but wished to work out a compromise arrangement for the balance of the Bupa debt. Unbeknown to Mr Gillibrand, in February 2010 the Bupa manager "forced" Gordon Gillibrand to sign a revocation of the power of attorney in favour of Mr Gillibrand. This destroyed Mr Gillibrand's ability to help his father.

(e) He said:

> It is not that I do not recognise Bupa's debt owed by my father's estate (although I do challenge the interest component), but that I find myself in a serious quandary and accordingly seek the Court's directions with regard to the quandary that I find myself in.

The nature of the quandary was itemised, but in essence it was a proposition that the estate had no liquid assets and there had been an "undertaking" from Gordon Gillibrand "as claimed by the trustees" that demand for the trust debt was not to be made and this caused difficulties for Mr Gillibrand in his capacity as executor. This was compounded by the fact that the Gillibrands had no available financial resources of their own to meet the debt. And there were no funds in the estate "to fight any legal battle against Bupa or the trust".

(f) Mr Gillibrand said that in consequence he "approached the Court for guidance on how he should proceed".

[41] The conclusion to Mr Gillibrand's affidavit, recorded in sub-paragraph (f) above, was consistent with Mr Swanepoel's evidence that he considered the best approach, in substance, was to seek directions from the Court.

[42] There was a directions conference on the removal application on 10 October 2012 before Heath J. Mr Swanepoel attended with Mr Gillibrand. The Judge's minute of the conference recorded the following:

> [3] Mr Gillibrand, because he holds positions as a trustee on both sides of the fence, finds himself in a difficult and conflicted situation. As I indicated to counsel this morning, the case seems to me to be one that calls out for the appointment of someone independent to investigate whether a debt is payable by the trustees of the Family Trust to the estate and, if so, whether anything material can be recovered.

[43] Mr Swanepoel, in his evidence, said that the Judge spoke directly to Mr Gillibrand and asked him whether he would step down as an executor and that Mr Gillibrand said that he would not. The Judge then said he was going to adjourn the conference to give Mr Swanepoel an opportunity to have a discussion with Mr Gillibrand on the possibility of appointing the Public Trust. The adjournment is noted in the minute. Mr Swanepoel said that he did have a discussion with Mr

Gillibrand who then agreed to stand down and to the appointment of the Public Trust. Mr Gillibrand's agreement was conveyed to the Judge. The matter was adjourned because counsel for Bupa had not been able to obtain full instructions. There was a further conference on 4 December 2012 when, essentially by consent, an order was made appointing the Public Trust as an additional and independent trustee of the estate. This appointment was for the limited purpose of investigating whether the trust debt was payable to the estate and, if so, whether "anything material can be recovered".

[44] The Public Trust, following enquiries, reported to the Court as required on 1 March 2013. The conclusions were that, from the information available to the Public Trust, the trust debt was owed to Gordon Gillibrand's estate and the trust had sufficient assets to pay the debt.

Mr Holgate instructed as counsel: November 2012

[45] Mr Holgate was first involved in this matter as an agent for Mr Swanepoel when Mr Swanepoel was on leave for approximately two weeks in October-November 2012. When Mr Swanepoel returned he was advised that the Gillibrands wanted Mr Holgate to act as counsel. In a formal sense, Mr Holgate was engaged as counsel, on instructions from Mr Swanepoel, from November 2012. Mr Swanepoel continued as solicitor on the record for the removal application.

[46] Mr Gillibrand said that Mr Holgate was instructed in October 2012 and, more particularly, that this occurred without any consultation with him and Mrs Gillibrand. The impression that Mr and Mrs Gillibrand sought to convey was that, although they did not object to Mr Holgate's acting as counsel, his involvement as counsel was something effectively foisted on them, and from that point everything was run by Mr Holgate in conjunction with Mr Swanepoel. I do not accept those contentions. My conclusions are that Mr and Mrs Gillibrand were enthusiastic to have Mr Holgate act as counsel. On Mr Swanepoel's return in November, he was told by Mr Gillibrand, and by Mr Holgate, that Mr Gillibrand wanted Mr Holgate to act on the removal application. Mr Swanepoel also became aware that without any reference to Mr Swanepoel, Mr and Mrs Gillibrand had instructed Mr Holgate on a claim arising out

of their motor vehicle accident. Mr Swanepoel said that it was apparent that Mr and Mrs Gillibrand and Mr Holgate "had developed a strong rapport". I am satisfied that they had, and that that remained the position at least until the delivery of the decision on the removal application in August 2013, and possibly up to the costs decision which followed in November 2013.

[47] There is a memorandum from Mr Holgate to Mr Swanepoel dated 5 November 2012, when Mr Swanepoel was still overseas, relating to a meeting with the Gillibrands. Notwithstanding contrary evidence from Mr and Mrs Gillibrand, I am satisfied that there was a meeting on or about that date. I am also satisfied that the memorandum accurately recorded the advice given by Mr Holgate to Mr and Mrs Gillibrand. The relevant matters were, in summary:

(a) The question of Mr Gillibrand's conflict of interest as executor was discussed and Mr Gillibrand was of the view that he was conflicted.

(b) Given the conflict, Mr Holgate recommended that Mr Gillibrand offer to stand down as executor with the Public Trust to be appointed.

(c) The proposal to stand down with appointment of the Public Trust was subject to satisfactory arrangements being made in respect of costs for any litigation that might follow.

[48] On 15 March 2013 Mr Holgate wrote to Gibson Sheat proposing that Mr Gillibrand step aside as executor, that the Public Trust administer the estate, and that costs were to be agreed once the litigation was concluded.

[49] Gibson Sheat sought clarification as to who would indemnify the Public Trust for its own costs in administering the estate. Mr Holgate's response to Gibson Sheat included the following:

> That blood-sucking client of yours let this particular genie out of the bottle, and having done so, will have to front indemnification, if any is required.

Change of position: the mistreatment allegations

[50] That decidedly unprofessional and intemperate description of Gibson Sheat's client heralded three things of consequence: a significant change in the advice Mr Holgate gave to the plaintiffs; a new position adopted by the plaintiffs on whether there was a debt owed by the estate to Bupa and on whether Mr Gillibrand should stand because of a conflict; a resistance by Mr Gillibrand to stand down because of a conflict of interest; and a general approach by Mr Holgate which lacked reasonable judgment and objectivity.

[51] The new position adopted by the plaintiffs was that Bupa had failed to provide proper care to Gordon Gillibrand in the period leading up to his death and that this provided a complete defence to Bupa's claim for the Bupa debt and grounds to oppose the removal application. I will refer to this as "the mistreatment allegations".

[52] The genesis of the mistreatment allegations was advice to Mr Swanepoel from Mr and Mrs Gillibrand, sometime before he went overseas in October 2012, that they had been informed by a number of people that Gordon Gillibrand had been badly treated by Bupa. Mr and Mrs Gillibrand contended that it was Mr Swanepoel who had first raised the possibility of what became the mistreatment allegations following a discussion Mr Swanepoel had had with another client of his, Frank Nola. I am satisfied that the genesis of the allegations was advice from Mr and Mrs Gillibrand to Mr Swanepoel. I also accept Mr Swanepoel's evidence on this matter as follows:

> I did not take the claims by Chris and Mary very seriously as I knew that they were both very upset with what they perceived as Bupa pressuring Gordon to revoke the [power of attorney from Gordon to Chris] and making unreasonable demands for payment of the Bupa Debt, and tended to latch on to anything that they believed would make Bupa look bad.

[53] Following that initial advice from Mr and Mrs Gillibrand, Mr Nola came to see Mr Swanepoel on an unrelated matter. Mr Nola saw Gordon Gillibrand's name on a file and mentioned that, the night before Gordon Gillibrand died, Mr Nola had been visiting an aunt of his at the resthome. Mr Nola said he had seen Gordon Gillibrand sitting by an open window in some distress and Mr Nola had spoken to a

nurse, but his concerns had been dismissed. Mr Swanepoel said that, although he did not consider that this evidence from Mr Nola was relevant to opposition to the removal application, he asked Mr Nola if he would be willing to provide an affidavit. This was because Mr Swanepoel thought the information might assist Mr Gillibrand in negotiating a settlement with Bupa.

[54] Most of the events to be recorded from this point were in 2013. For that reason, from this point, where a date is recorded, I have omitted the year if it is 2013.

[55] The first advice to a third party of the mistreatment allegations had been in a letter from Mr Holgate to the Public Trust in February. The letter records, in fairly categorical terms, allegations of mistreatment or failure to provide proper care, with a statement that, "on the face of the evidence available", there were serious failings by Bupa. There was no evidence to support the serious allegations that were made. A draft of the letter included a sentence as follows:

> While the conditions in which Mr Gillibrand died may have been appropriate in Auschwitz, I have little doubt on viewing the emerging evidence that [Bupa] was culpable in Law.

[56] Mr Holgate, in accordance with a standing arrangement he had with Mr Swanepoel, asked Mr Swanepoel's secretary to type the draft. Mr Swanepoel's secretary showed the draft to Mr Swanepoel because she was concerned by the Auschwitz reference. Mr Swanepoel then spoke to Mr Holgate, "remonstrated with him", as Mr Swanepoel put it, and required the statement to be removed. The draft had in the meantime been approved by the Gillibrands. Mr Holgate, when the final version went to the Public Trust, sent a copy to the Gillibrands with a comment:

> Older and wiser minds have prevailed and I moderated my comments – the Auschwitz comparison while suited to my dark humour would cause more trouble than we want or need.

The second opposition: May 2013

[57] On 23 May an amended notice of opposition to the removal application was filed and served (the second opposition). The second opposition introduced the mistreatment allegations and these were at the forefront of the opposition from that point. These new grounds of opposition, compared with what went before, were

central to a subsequent decision of Heath J in the removal proceeding ordering Mr Gillibrand to pay indemnity costs to Bupa for all costs incurred from 23 May.

[58] The second opposition was filed without any reference to Mr Swanepoel. Mr Swanepoel's evidence, which I accept, was that he did not recall seeing the second opposition, or a third opposition referred to below, until around 11 July.

[59] The mistreatment allegations were very specific, as follows:

(a) It was alleged that Gordon Gillibrand died due to Bupa's negligence, with particulars in that regard including the following:

- Gordon Gillibrand "had chronic bronchitis or quite possibly cardio-pulmonary obstructive disease".

- Gordon Gillibrand was placed at a wide open window when the cold air coming in exacerbated his condition and increased the distress that he was in and when he could not move himself.

- Bupa failed to monitor Gordon Gillibrand and had it done so his death could have been averted.

(b) It was alleged, in the alternative, that if Gordon Gillibrand was terminally ill Bupa's negligence brought his death forward and shortened his life such that there was a "causal link between Bupa's conduct and the death of" Gordon Gillibrand.

(c) There was an alternative defence that Bupa was precluded from recovering its fees because it came to Court without clean hands.

(d) There was a third alternative contention that Bupa was precluded from recovering its fees because its treatment of Gordon Gillibrand "was inhuman [sic] and degrading treatment and/or punishment". This included a particular that Gordon Gillibrand "was effectively left to

drown on the mucous [sic] in his lungs, alternatively left in great distress with callous disregard to the distress that he was in".

(e) In respect of the mistreatment allegations, the opposition concluded:

> In all the circumstances Bupa seeks reward from [Gordon Gillibrand's] estate for killing him. This is both an absurd claim and a clear instance of trying to take advantage of its own wrong-doing.

(f) The second opposition also recorded that there was an issue whether the trust debt had been forgiven, with a positive statement that "there is evidence to show that the debt has been forgiven". It may be noted here that no evidence was ever produced that the debt had been forgiven other than the generalised contentions of Mr and Mrs Gillibrand to that effect.

Bupa objections

[60] Gibson Sheat wrote to Mr Holgate on 30 May. There were two main points in the letter. The first was to the essential effect that the grounds of opposition did not provide grounds for opposing the removal order sought. The reasons for and the extent of Mr Gillibrand's conflict were set out in detail. The second point concerned the nature of the mistreatment allegations. Reference was made, in particular, to the allegation that "… in all the circumstances Bupa seeks reward from the deceased's estate for killing him …". Gibson Sheat said that the allegations in the second opposition "amount to imputations of a criminal nature and could not be more serious". They then referred to the professional duty of lawyers to ensure that there were proper grounds for making such allegations. Case authority was cited, including a quotation of observations of Lord Reid in *Rondel v Worsley*[3] and the New Zealand Court of Appeal in *Gazley v Wellington District Law Society*,[4] citing the passages from *Rondel v Worsley*.

[61] Gibson Sheat's letter recorded, at the end of it, that it was copied to Mr Swanepoel. Mr Swanepoel said he did not recall seeing it at the time.

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3 *Rondel v Worsley* [1969] 1 AC 191 (HL) at 227 and 231.

4 *Gazley v Wellington District Law Society* [1976] 1 NZLR 452 (CA) at 453.

The third opposition and Mr Gillibrand's second affidavit

[62] On 10 June a further amended opposition to the removal application was filed (the third opposition) with a further affidavit from Mr Gillibrand (the second affidavit). These documents were prepared and filed without reference to Mr Swanepoel. When these documents were filed and served there had been no response from Mr Holgate to the letter of 30 May from Gibson Sheet. The third opposition maintained the mistreatment allegations in terms similar to the second opposition, including the following:

- Bupa was culpable for causing Gordon's death.
- Bupa failed to monitor Gordon when he was in significant distress, and had it done, the death could have been averted.
- On being warned of Gordon's plight Bupa and its staff showed contumelious disregard for Gordon's rights and circumstances by refusing point blank to take any steps at all.
- The Deceased was effectively left to drown on the fluid in his lungs, alternatively left in great distress with callous disregard to his plight.
- In all the circumstances Bupa seeks reward from the Deceased's estate for killing him.

[63] The second affidavit of Mr Gillibrand, sworn on 7 June, the date of the third opposition, was an affidavit in support of an application that Bupa make discovery of all of Gordon Gillibrand's medical records held by Bupa and in support of the opposition to the removal application. The discovery application was made on the grounds that the documents sought were relevant to the removal application and also relevant to an intended application for declaratory orders relating to Bupa's treatment of Gordon Gillibrand. In support of the application, Mr Gillibrand produced a statement of Mr Nola which had been prepared in the form of an affidavit by Mr Swanepoel but had not been sworn. This affidavit did not contain any evidence in support of the serious allegations in the opposition.

[64] Mr Gillibrand said that he had been given no opportunity to read the affidavit and effectively disclaimed any knowledge of its content. I do not accept that evidence. This aspect of Mr Gillibrand's evidence is discussed more fully below, when considering questions of credibility.

The third affidavit

[65] There is a third affidavit of Mr Gillibrand dated 21 June. Mr Gillibrand did not refer to this affidavit in his brief of evidence, but confirmed in cross-examination that he had read this affidavit. This affidavit was prepared following directions from Heath J for any further affidavit evidence to be filed for the hearing of the removal application in the event that settlement was not reached, and settlement was not reached. Mr Gillibrand provided a factual narrative of his own observations when he visited his father on 14 April 2011, the day before he died. There was no evidence from Mr Gillibrand in this relatively short narrative bearing on the quality of the care provided by Bupa staff and Mr Gillibrand concluded his summary by saying:

> In retrospect I do not know whether Dad's doctor had been to see him by that point or not.

This was at the end of the day after Mr Gillibrand had finished work. Mr Gillibrand was advised at around midday the following day that his father had died.

[66] He concluded this part of his affidavit by saying:

> To sum up, I had always understood that Dad was supposed to be cared for by Bupa and instead I find that his final days were certainly not his best days. It will be argued at the hearing of this Application that the care provided came nowhere near being good enough.

[67] Towards the beginning of the affidavit there is a paragraph which records, in part:

> 4 This affidavit is intended to cover the following points:
>
> 4.1 The fact that no conflict has arisen in respect of the different hats I wear as trustee, administrator and beneficiary.
>
> 4.2 The fact that the debt which is pivotal to Bupa's right to be in this Court in this application have not been established [sic], and there are reasonable grounds to repudiate that claim.

The Bupa debt proceeding

[68] On 27 June Bupa filed a claim against Mr Gillibrand, as executor of the estate, seeking judgment under the resthome contract for $51,759.57, together with

interest pursuant to the contract and costs (the Bupa debt proceeding). A defence was filed. This included the mistreatment allegations generally as advanced in the second and third oppositions. The statement of defence was consistent with a draft first sent to, and approved by, Mr and Mrs Gillibrand.

Mr Holgate's disclosure to media

[69] The Bupa debt proceeding was served on 28 June. That evening, at 7:03 pm, Mr Holgate sent an email to the court reporter for the Northern Advocate newspaper. The Northern Advocate is the main newspaper circulating in Whangarei and the wider district. Mr Holgate sent copies of the Bupa debt proceeding documents, the third opposition, the draft statement of claim for the declaratory orders (and therefore a document that had not been filed), and the affidavits that had been filed for the Gillibrands. Mr Holgate provided a link to two website news reports of alleged negligence of Bupa in the United Kingdom.

[70] Mr Holgate added a number of comments which he said were "just to clear things up for" the court reporter. Two matters of particular relevance are the following:

> Chris and the estate have refuted [Bupa's claim for fees] saying that Bupa caused Gordon to die in absolutely inhumane and distressing circumstances and they forfeited the right to payment of anything because of their wrong-doing – the evidence is very bluntly stated in affidavits – Mr Nola's [affidavit] shows that there were even reprisals by Bupa against him because he came forward to give evidence about the case.

Mr Holgate referred to a copy of the letter of 30 May from Gibson Sheat, which was attached to Mr Gillibrand's third affidavit. Mr Holgate said to the court reporter:

> … We exhibit a letter where Bupa's solicitor says that we are making a serious allegation of wrong-doing – as you can see from the evidence we have filed, we are pulling no punches about the fact that we can produce evidence on oath to back it up.

[71] On 5 July the Northern Advocate published an article which included quotation of Mr Gillibrand's allegation that Bupa sought reward from the estate for killing Gordon Gillibrand. The article was also published on the New Zealand Herald website.

[72] Mr Holgate did not have any discussion with Mr Swanepoel about the possibility of providing information to the Northern Advocate and Mr Swanepoel had no knowledge of this before the article was published. The initiative for this action was Mr Holgate's. He discussed this with Mr and Mrs Gillibrand beforehand and, on the basis of Mr Holgate's advice, they agreed. Mr Gillibrand said in his brief of evidence that he "now realised there should have been no involvement of the media while the issues were before the Court". I record here that Mr and Mrs Gillibrand cannot be criticised for authorising this action on the advice of Mr Holgate.

Bupa's further objection and evidence in reply

[73] On 8 July Gibson Sheat sent an email to Mr Holgate and Mr Swanepoel. This attached a copy of the article published on the New Zealand Herald website on 5 July. They noted that there had been no response to their letter of 30 May and that the newspaper article repeated the allegations notwithstanding the points made for Bupa about an absence of evidence. They asked whether Mr Holgate and Mr Swanepoel were aware that Mr Gillibrand had approached the media before the article was published. Mr Swanepoel did not reply. Mr Holgate's response was quite misleading. He said:

> I don't get the Northern Advocate or Herald but was told about this article by a client.

Mr Holgate then set out, in combative terms, what he considered was justification for continuing with the mistreatment allegations.

[74] On 11 July there was a further letter by email from Gibson Sheat to Mr Holgate and to Mr Swanepoel. Although Mr Swanepoel said he did not recall seeing either of the 8 July emails, he did not suggest that he did not see the 11 July letter. Gibson Sheat again referred to the 30 May letter and noted that there had been no response, but that the third opposition and some affidavits had subsequently been filed. Gibson Sheat then set out, in substantially more detail than in their 30 May letter, why the allegations should not have been put before the Court and why the purported evidence in support of the allegations did not permit the making of seven specific allegations of fact contained in the third opposition.

[75] I agree with the opinions expressed by Gibson Sheat.

[76] On 11 July Bupa filed two affidavits responding to the mistreatment allegations. These affidavits support the position taken for Bupa in Gibson Sheat's letters of 30 May and 11 July. They positively establish, when weighed with the evidence from and for Mr Gillibrand filed up to that point, that there was no mistreatment, or negligence, by Bupa.

[77] Following Gibson Sheat's 11 July letter and service of the two Bupa affidavits, nothing was done to withdraw or modify the mistreatment allegations. Mr Swanepoel and Mr Holgate responded to Gibson Sheat. Both defended the steps taken in the removal proceeding, of which Bupa complained, and contended that the allegations were properly put before the Court. Mr Holgate's response can only be described as aggressive. It also included a threat of a claim for full indemnity costs in the event that Mr Gillibrand succeeded in the proceedings.

The Gillibrands' statement to Campbell Live

[78] On 29 July Mrs Gillibrand sent an email to the television programme Campbell Live. There was a lengthy statement from Mr Gillibrand attached to the email. The statement is headed:

RESTHOME KILLED MY FATHER!!!!!

"BUPA MISTREATED MY FATHER WHILE THEY WERE RESPONSIBLE FOR HIS CARE, IN MORE WAYS THAN ONE!!!!! (YOU NAME IT THEY DID IT)

"THEY KILLED HIM"

BUPAS TREATMENT TOWARDS MY FATHER WAS INHUMAN, DEGRADING AND OR PUNISHMENT, MORE PARTICULARLY!!

WHY???

FOR BEING IN DEBT TO (KAURI COAST RESTHOME) BUPA CARE SERVICES!!

Towards the end of the statement there was the following: "We have affidavits to support this case!!".

[79] Mr Holgate was not consulted before Mrs Gillibrand sent this document to Campbell Live. Immediately after it was sent Mrs Gillibrand sent a copy to Mr Holgate. She said, in reference to Bupa: "Hopefully it will get up their noses big time, it's about time someone made their life hell!!!". Mrs Gillibrand then sent a copy to Mr Swanepoel with a note: "Thought I would send this to you to read as well!" On 30 July Mr Holgate sent an email to Mrs Gillibrand in which he said, amongst other things:

> At this stage I think we have needled Bupa enough, and if there is any further publicity so be it, but maybe let's soften it a bit so that we aren't accused of doing ourselves out of a jury trial because the jurors will all be biased from reading the newspaper.

The removal decision

[80] Justice Heath's decision on the removal application, other than on costs, was delivered on 14 August.[5] The most material part of the judgment is the following:

> [21] In my view, Bupa has made out a case for removal because:
>
> (a) A removal order is required to ensure that the estate is properly administered. An executor is required to execute the terms of the Will. The late Mr Gillibrand's Will requires all debts of the estate to be paid before distributions are made to beneficiaries.
>
> (b) An independent and impartial mind must be applied in assessing whether a debt is validly claimed. Decision-making should not be clouded either by emotional or (personal) financial considerations.
>
> (c) Mr Gillibrand's ability to bring an independent mind to the question whether the debt is valid is questionable, to say the least. He has strongly held views (not presently substantiated in any meaningful way) about the impact of Bupa's care on his father, believing it was causative of death. He also has financial interests to protect; both as sole beneficiary of the estate and the trustee (and beneficiary) of a Trust, a debt from which is the only source from which money could be recovered to pay Bupa.
>
> (d) In any event, even if the Bupa claim were permitted to proceed to trial, with Mr Gillibrand defending it on behalf of the estate, a successful claim would undoubtedly require Mr Gillibrand to retire as personal representative, given that he would need to sue himself to recover any debt owed by the Trust. Questions have also been raised about whether that debt was forgiven by Mr Gillibrand senior. They too require independent consideration.

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5 *Bupa Care Services NZ Ltd v Gillibrand* [2013] NZHC 2086, [2013] 3 NZLR 701 (footnotes omitted).

[81] Stuart Henderson, a solicitor in the Whangarei firm of Henderson Reeves Connell Rishworth Lawyers Ltd (Henderson Reeves), was appointed executor in place of Mr Gillibrand. The Judge said:

> [25] I have no doubt that Mr Henderson will take proper steps to determine whether there is any basis for the estate to challenge the Bupa debt, on the basis of an unliquidated equitable set-off or counterclaim [based on the mistreatment allegations]. If the debt were accepted, Mr Henderson could also determine what steps to take to get any remaining assets to meet the liability.

[82] Costs were reserved with directions for submissions on costs.

The costs decision: November 2013

[83] The decision on the costs application was delivered on 20 November.[6] The Judge briefly outlined the background to his substantive decision, and then set out in some detail the earlier procedural history, and in particular the content of the three oppositions and directions and observations the Judge himself had made in earlier minutes. He then noted that Bupa had originally sought indemnity costs against Mr Holgate and Mr Swanepoel as well as Mr Gillibrand. The claim against the lawyers for indemnity costs had been withdrawn by Bupa for pragmatic reasons – mainly to avoid delay because of the need for independent representation. The Judge nevertheless noted, in respect of the fact that there had earlier been the claims against the lawyers:

> [21] As the question of conduct of the lawyers is before their professional body, I do not propose to comment further on that aspect. Nevertheless, given the nature of the costs order which I shall be making, it will be for the lawyers to reflect on who should bear the burden of them, having regard to the nature of advice given and instructions received. In the absence of evidence to the contrary, I proceed on the basis that Mr Gillibrand expressly instructed his solicitor and counsel to make the allegations in issue.

[84] The Judge concluded that Mr Gillibrand should pay indemnity costs to Bupa for all steps in the proceedings from the filing of the second opposition on 23 May, with costs prior to that date being on a standard 2B basis. The principal reasons for this conclusion were as follows:

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6 *Bupa Care Services NZ Ltd v Gillibrand* [2013] NZHC 3067.

[22] Up to the time of the letter of 15 March 2013, sensible steps appear to have been taken to resolving the litigation. While Mr Gillibrand disputed the need for him to step aside as executor, he was doing so on conventional grounds.[7] When agreement was not reached in terms of the letter of 15 March 2013, the situation was greatly inflamed by the allegations made by Mr Gillibrand of Bupa's conduct. While I accept that Mr Gillibrand honestly believed that what he was saying was true, there was no plausible narrative on which those allegations could properly rest.[8]

…

[26] I am satisfied that the allegations made by Mr Gillibrand from the date on which the second notice of opposition was filed on 23 May 2013 justify either increased or indemnity costs. The allegations were based (initially) on speculation and (later) on relatively flimsy evidence. The furthest the evidence of Mr Nola could go was to raise some questions about the standard of care that Mr Gillibrand snr received on the final day of his life. The evidence went nowhere near creating a foundation for the serious allegation that the standard of Bupa's care had caused Mr Gillibrand snr's death. The nature of that allegation necessarily required Bupa to respond and, in doing so, to incur costs far in excess of those that one would ordinarily expect to enforce a debt of just over $50,000.

[27] Further, the allegations in relation to Bupa's care were never relevant to the application to remove Mr Gillibrand as an executor. The question was always whether Mr Gillibrand was sufficiently independent and impartial to carry out his duties as an executor, in identifying debts to be paid and ensuring assets of the estate were realised to meet them. The focus, as the solicitors for Bupa pointed out to Mr Holgate in their letter of 30 May 2013,[9] was on Mr Gillibrand's ability to fulfil that function. The proceeding was not designed to determine whether any debt was owed by the estate to Bupa.[10] In those circumstances, the serious allegations raised to support an alleged counterclaim simply evidenced the state of hostility that had developed between Mr Gillibrand and Bupa. From Mr Gillibrand's perspective, that was a negative factor on the removal application.

…

[30] Once Mr Gillibrand accepted that (in the absence of a successful set-off or counterclaim) Bupa's debt was payable, and a state of hostility was accepted as existing between himself and Bupa, any defence to the removal application that was based on the possibility of raising a set-off or counterclaim on the grounds that Bupa acted in a manner that was causative of Mr Gillibrand snr's death was "hopeless", in the sense used in *Bradbury v Westpac Banking Corporation*.[11] In my view, this brings the case squarely within the category of cases that demand imposition of indemnity costs for

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7 *Bupa Care Services NZ Ltd v Gillibrand*, above n 6, at [11].
8 *Bupa Care Services NZ Ltd v Gillibrand*, above n 5, at [2].
9 *Bupa Care Services NZ Ltd v Gillibrand*, above n 6, at [17].
10 *Bupa Care Services NZ Ltd v Gillibrand*, above n 6, at [21], set out at *Bupa Care Services NZ Ltd v Gillibrand*, above n 6, at [6]. See also, *Bupa Care Services NZ Ltd v Gillibrand*, above n 6, at [17].
11 *Bradbury v Westpac Banking Corporation* [2009] NZCA 234, [2009] 3 NZLR 400.

> making serious unsubstantiated allegations that put the reputation of the other party in issue.[12]
>
> [31] Given the way in which the litigation was conducted up to 23 May 2013,[13] I consider that Bupa should have costs on a 2B basis, together with reasonable disbursements, to that date, with indemnity costs thereafter.

[85] The Judge concluded with the following in respect of Mr Henderson's costs:

> [35] Mr Henderson, the present executor, abided the decision of the Court on costs. There may be an issue as to whether Mr Gillibrand, having regard to the nature of his conduct, should be entitled to an indemnity out of the estate for the costs that have been ordered. That issue should be discussed between Mr Henderson and Mr Gillibrand's advisers in the first instance.

Following the costs decision

[86] Following the costs decision Mr Henderson, for Gordon Gillibrand's estate, made demand on the trust for a payment of $200,000. This was a rounded amount calculated by Mr Henderson as the sum required to settle the total debt then due to Bupa, including the costs award, the debt to Webb Ross, and Mr Henderson's costs and expenses as executor.

[87] The trust had, in the meantime, entered into an agreement to sell a subdivided section of the farm that had been acquired from Gordon Gillibrand. Mr Swanepoel acted for the trust on the sale. Settlement occurred on 29 August 2013. I am satisfied, having weighed a good deal of conflicting evidence, that this is the first date on which the trust, or the Gillibrands personally, were both willing and able to pay any sum of consequence to the estate in further repayment of the trust debt. It is the proceeds of sale of the farm section that were subsequently used to meet the estate's liability to Bupa and to meet the two other liabilities.

[88] Mr Swanepoel acted for the trust and Mr Gillibrand in negotiating settlement of Bupa's claim in a sum of $150,000. On 17 December the trust paid $150,000 to the estate of Gordon Gillibrand which was in turn paid in full settlement of Bupa's claims.

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12 *Bradbury v Westpac Banking Corporation*, above n 11.

13 Being the date on which the second notice of opposition was filed, see *Bupa Care Services NZ Ltd v Gillibrand*, above n 6, at [16].

[89] Mr Swanepoel ceased acting for the plaintiffs soon after that settlement was effected. In April 2014, after proceedings were issued by Mr Henderson, as executor, against the trustees for the remaining debts, a further sum of $32,385 was paid by the trust to Gordon Gillibrand's estate to pay the debt to Webb Ross and for Mr Henderson's fees and expenses as executor.

Summary of claims: duty and breach

[90] Fifty-nine alleged breaches of duty by Mr Swanepoel and fifty-two by Mr Holgate were itemised in the plaintiff's closing submissions. Ms Twomey, for Mr Swanepoel, objected to the plaintiffs' seeking to rely on allegations which had not been pleaded, or otherwise properly notified in sufficient time to avoid prejudice to Mr Swanepoel. Reference was made, in particular, to allegations of breach put to Mr Swanepoel for the first time in the course of cross-examination. I infer from Mr Holgate's submissions that there was a similar objection from him to a multiplicity of unpleaded claims.

[91] These objections were upheld. The relevant statement of claim is the amended statement of claim filed on 8 July 2015, as further amended on the oral application of Mr Patterson, for the plaintiffs, at the commencement of the hearing. There was no opposition to that application. The defence evidence, documentary as well as briefs of evidence, was prepared on the basis of the amended statement of claim and the plaintiffs' briefs. Apart from the minor amendments at the commencement of the hearing, the plaintiffs did not at any point apply for leave to make further amendments. The amended statement of claim is a 34 page document with detailed and very specific allegations. I was satisfied that there were no good grounds to permit the plaintiffs to expand their allegations to include the very large number of additional allegations of breach in the closing submissions.

[92] The plaintiffs pleaded two alternative claims against Mr Swanepoel. The only difference between the claims is one of quantum; a difference of just under $15,000 claimed for one type of loss. This is explained later.

[93] It was alleged against Mr Swanepoel that, in respect of issues arising on Bupa's claims against Gordon Gillibrand, and then against his estate, for the

resthome fees, and on the subsequent removal application, Mr Swanepoel owed duties of care to Mr and Mrs Gillibrand as trustees of the trust or, alternatively, to Mr Gillibrand personally in respect of his interest as sole beneficiary of the estate and his potential liability as executor.

[94] Against Mr Holgate it was alleged that he owed duties of care to the trustees and Mr Gillibrand personally when he was instructed in December 2012 to act as counsel for Mr Gillibrand, as executor, on the removal application.

[95] The amended statement of claim has eleven separate pleadings of negligence against Mr Swanepoel. Some of these contain multiple and distinct instances of alleged negligence. The relevant claims are summarised below. In broadest terms, it was alleged that advice given by Mr Swanepoel was wrong, or inadequate, and that he failed to give advice he should have given.

[96] There are seven separate pleadings of negligence against Mr Holgate, some of which also contain multiple instances of alleged negligence relating to advice that was given and advice which it is contended should have been given.

[97] There is a reasonably substantial number of topics in respect of which it is alleged the defendants breached duties of care. But I am satisfied that there are only two main topics requiring attention and a third topic which is an element of both of the main topics – the conflict of interest issue.

[98] The first topic concerns alleged negligence on the question whether the trust's debt to Gordon Gillibrand had been forgiven by him, or was still recoverable by him, and, following his death, by his estate. I will refer to this as the trust debt issue. The essence of the contentions against Mr Swanepoel were that:

(a) Before Gordon Gillibrand died, Mr Swanepoel negligently advised that it was arguable that the debt had been forgiven and, therefore, the trust did not have to make any payment. It was contended that, but for this advice, the trust would have paid the resthome fees and the

amount paid by the trust would have been substantially less than the amount finally paid, in substance, by the trust.

(b) After Gordon Gillibrand died Mr Swanepoel negligently advised the plaintiffs that the trust debt was not recoverable by the estate, the estate was insolvent, and this in turn provided good grounds for opposing the removal application and for the estate to resist the claim for the Bupa debt.

[99] Against Mr Holgate, in respect of the trust debt issue, it was alleged that Mr Holgate was negligent in failing to advise the plaintiffs that Mr Swanepoel's advice that the trust had no liability to the estate for the trust debt was incorrect, with related contentions as to advice that should have been given.

[100] The second main topic concerns the opposition to the removal application in reliance on the mistreatment allegations. From this point I will use the expression "the mistreatment allegations" to refer to this main topic as well as to the subject matter of the allegations.

[101] The main thrust of the negligence claims against both Mr Swanepoel and Mr Holgate in respect of the mistreatment allegations was broadly the same: that the plaintiffs should not have been advised that they could rely on the mistreatment allegations as grounds to oppose the removal application and to resist the Bupa debt claim. There are five distinct pleadings, each with several allegations of negligence. The pleadings of most relevance are those relating to the second and third oppositions. These pleadings, in summary, are as follows:

(a) In respect of the second opposition:

(i) Mr Holgate did not seek the plaintiffs' instructions regarding the change in strategy reflected in the second opposition or before filing the second opposition, he failed to explain to the plaintiffs the risks of making such allegations, and he did not

obtain the plaintiffs' informed consent to raising such allegations.

(ii) Mr Swanepoel failed to advise the plaintiffs of Mr Holgate's intention to change strategy and file the amended opposition, and he failed to advise the plaintiffs against pleading such allegations.

(b) In respect of the third opposition:

(i) Against Mr Holgate: there was no evidential basis for the allegations Mr Holgate made in the third opposition, he failed to explain to the plaintiffs the risks of making the allegations, and he did not obtain the plaintiffs' informed consent to raise the allegations.

(ii) Mr Swanepoel failed to advise the plaintiffs of Mr Holgate's intention to change strategy and file the amended opposition, and failed to advise the plaintiffs against pleading such allegations.

(c) In respect of the mistreatment allegations generally, and against Mr Swanepoel and Mr Holgate, they failed to advise the plaintiffs that the mistreatment allegations did not provide grounds to oppose the removal application.

[102] As earlier noted, there are numbers of additional allegations of negligence which concern other topics, or which might be thought not to fit into one of the two topics I have outlined. For the avoidance of doubt I record that I have reviewed these other allegations and I am satisfied that they do not provide any reasonably arguable grounds for establishing liability on the part of Mr Swanepoel or Mr Holgate. I will comment briefly on one of these other topics, but otherwise I do not consider it necessary to discuss the other topics or allegations.

[103] As indicated in the factual narrative, a matter of particular concern to Mr Gillibrand, supported by Mrs Gillibrand, was the fact that the power of attorney from Gordon Gillibrand to his son had been revoked. Mr Gillibrand considered that the Bupa manager had acted improperly in the steps that he had taken, or instigated, which resulted in the revocation of the power of attorney and the instruction of Mr Spicer. Mr Swanepoel was consulted in that regard, and it was alleged that Mr Swanepoel was negligent in failing to act appropriately. I was not persuaded by the evidence that there was any negligence on the part of Mr Swanepoel. In addition, and perhaps the decisive reason for not spending time on this topic, even if it is assumed that there was some negligence, is that there was no evidence indicating how the alleged negligence caused any loss, or could have caused any loss, to the trustees or to Mr Gillibrand personally. It is conclusions of that nature which satisfied me that the other topics, which I have not identified, do not need to be discussed. I am satisfied that the two topic analysis will adequately address the relevant contentions.

Summary of claims: losses

Special damages for increased payments to Bupa and legal fees: the overpayment claim

[104] The principal claim of loss is that the alleged negligence of Mr Swanepoel and Mr Holgate resulted in the estate paying Bupa, in interest and legal costs, more than it would have had there been no negligence, and in the estate incurring liabilities to lawyers that it would not have incurred had there been no negligence. It is further claimed that, in consequence, the trust suffered a loss by paying to the estate more than it would have otherwise been required to pay had there been no negligence. I will refer to this as the overpayment claim. The quantification is summarised in the following table.

PAYMENTS MADE:

A	To Bupa – to settle	150,000.00
B	To Webb Ross – fees and interest	9,566.88
C	Mr Henderson's costs as executor	22,818.19
D	Total paid by trust for estate to pay A, B and C	182,385.07
E	Legal costs on Mr Henderson's claim	1,000.00
F	Total paid by trust	**$183,385.07**

BASE DEBT: amount that would have been paid but for negligence

		First alternative - would have paid no later than July 2012	**Second alternative** - would have paid no later than March 2013
G	Bupa	40,191.04	55,000.00
H	Webb Ross "no more than"	8,000.00	8,000.00
I	Total	**$48,191.04**	**$63,000.00**

QUANTIFICATION OF ALTERNATIVE CLAIMS AGAINST MR SWANEPOEL:

	Quantum on first alternative	**Quantum on second alternative**
Total F	183,385.07	183,385.07
Less Base Total I	48,191.04	63,000.00
Claim by trust:	**$135,194.03**	**$120,385.07**
Less E	1,000.00	1,000.00
Claim by Mr Gillibrand:	**$134,194.03**	**$119,385.07**

[105] The quantum of the claims by the trust and Mr Gillibrand against Mr Holgate are as recorded under the second alternative only.

Other claims

[106] There are two other categories of loss or damages. One is a claim for wasted legal costs for fees paid to Mr Swanepoel and Mr Holgate. The other is a claim for general damages of $30,000 each for Mr Gillibrand and Mrs Gillibrand "as compensation for stress and anxiety". These claims do not require further explanation at this stage.

Decision on Mr Gillibrand's claim

[107] It is appropriate to record at this point, and before outlining the defence cases for Mr Swanepoel and Mr Holgate, my conclusion that Mr Gillibrand's personal claim as a beneficiary has not been made out on the case as presented by the plaintiffs. The essence of the reason for that conclusion is that, on the case advanced by the plaintiffs as a group, including Mr Gillibrand in respect of his personal claim, there was never going to be any money in the estate for payment to Mr Gillibrand as a beneficiary.

[108] The factual narrative establishes clearly that the plaintiffs as a group, including Mr Gillibrand in respect of any notional interest he had as a beneficiary, were determined to ensure if at all possible that no money would go from the trust to the estate and that if, at the end of the day, it was established that the estate had debts which it had to pay, the sum that would go from the trust to the estate would be no more than the sum required to pay those debts.

[109] On the basis of that analysis the loss claimed to have been sustained by Mr Gillibrand as a beneficiary is illusory. Mr Gillibrand himself has given no evidence that he intended that some money would go from the trust into the estate in order for him to receive a payment as a beneficiary.

[110] This conclusion means that, if it is assumed that Mr Swanepoel and Mr Holgate owed duties of care to Mr Gillibrand as a beneficiary, and that Mr Swanepoel and Mr Gillibrand breached their duties of care in that regard, their negligence did not cause any loss to Mr Gillibrand as a beneficiary. What the plaintiffs advance as a "loss" in respect of the alternative claim by Mr Gillibrand is in respect of a theoretical surplus in the estate, but one which was never going to be there in fact.

[111] There are other reasons why Mr Gillibrand's claim would in any event be dismissed. The claims of negligence by Mr Gillibrand personally against Mr Swanepoel are the same as the claims of negligence by the trustees against Mr Swanepoel. For reasons I come to, I have found that Mr Swanepoel did owe a duty of care to the trustees but was not negligent. In respect of Mr Holgate the claims of

negligence by the trustees and by Mr Gillibrand personally are again the same. I have found that Mr Holgate also owed a duty of care to the trustees and was negligent. The primary claim is that of the trust. For this separate reason it is unnecessary to consider Mr Gillibrand's personal claim which was presented as a claim made in the alternative only in the event that the Court found that a duty of care was not owed to the trustees.

[112] Given these conclusions, in the remainder of this judgment, it will be unnecessary to refer further to matters relevant to Mr Gillibrand's personal claim as a beneficiary.

Mr Swanepoel's defence to the trustees' claims

[113] Mr Swanepoel denied liability for negligence in all respects: as to duty, breach, causation, and the quantum of the loss claimed. His contentions are outlined in the following paragraphs.

Duty

[114] Mr Swanepoel contended that he did not owe a duty of care to Mr and Mrs Gillibrand as trustees. He contended that, as a matter of fact, he was not at any time, before or after Gordon Gillibrand's death, acting for the trust in respect of the matters in issue, and that he did not otherwise owe a duty of care to the trustees in respect of those matters.

Breach

[115] Mr Swanepoel contended that, if he did owe a duty of care, there was no negligence in the advice he gave, either before Gordon Gillibrand died or following his death. Mr Swanepoel contended that he gave appropriate advice on all matters of consequence including, in particular, the trust debt issue and the mistreatment allegations, and acted on the Gillibrands' instructions informed, where required, by competent advice from him. He said that he did not at any time assure the plaintiffs that the trust debt was not recoverable by the estate, and that he gave appropriate advice on risk in respect of the contentions advanced on the removal application, the

Bupa debt claim, the mistreatment allegations, and the related issue of a conflict of interest.

[116] Mr Swanepoel further contended that, from the time Mr Holgate was instructed, he sought both advice from Mr Holgate, and assurances from Mr Holgate, in respect of the advice Mr Holgate was giving to Mr and Mrs Gillibrand, and acted properly in accordance with the advice and assurances he got. In consequence, Mr Swanepoel said there was no negligence by him. The legal principles in that regard, and in respect of a lawyer's obligation to act in accordance with instructions given by the client, are discussed when evaluating the question whether there was a breach of duty by Mr Swanepoel.

Causation and loss: the overpayment claim

[117] Mr Swanepoel contended that the trust suffered no loss. The proposition was that the trust always had a debt of $350,000 which, in the end, was owed to the estate. The payments that were made were pursuant to that liability and by making the payment the trust did not incur any loss. Ms Twomey put it on the basis that the trust's net asset position did not change.

[118] Mr Swanepoel also challenged in a substantial way the quantification of the overpayment claim.

Defence to other claims

[119] Mr Swanepoel denied liability for the other claims. It is unnecessary to summarise his arguments at this point.

Mr Holgate's defence to the trustees' claim and his cross-claims

[120] Mr Holgate, as with Mr Swanepoel, denied liability in all respects: as to duty, breach, causation and the quantum of the loss claimed.

[121] He denied that he owed any duty of care to Mr and Mrs Gillibrand as trustees. He contended that the only duty of care he owed was to Mr Gillibrand as

executor and solely in respect of the matters relating to the removal application and the Bupa debt proceeding.

[122] Mr Holgate maintained that there was no breach by him of the duty of care he owed to Mr Gillibrand as executor, or to the trustees if a duty was owed to them. He contended that: the advice he gave was competent advice; he gave advice on all matters that would be required to be given by a reasonably competent lawyer in the particular circumstances of the proceedings he was dealing with; his advice included appropriate advice on the risks, including risks in relation to costs; competent advice was given on the specific matters raised by the plaintiffs in the pleadings, including the conflict of interest for Mr Gillibrand and the need for evidence to support the mistreatment allegations; the steps he took were taken on the instructions he received from Mr Gillibrand, supported in a number of instances by Mrs Gillibrand; and competent advice was given on the option of settlement.

[123] On issues of causation and loss Mr Holgate advanced similar arguments to those advanced by Mr Swanepoel. Mr Holgate also argued, in broad terms, that to the extent the plaintiffs suffered a loss, this arose from their decision, in effect, to resist Bupa come what may, notwithstanding the advice given by Mr Holgate.

[124] Mr Holgate pleaded what are described as seven affirmative defences. Most of these are, in substance, different ways of expressing the arguments in defence already referred to. Two further affirmative defences, a counterclaim by Mr Holgate against Mr and Mrs Gillibrand as trustees, and a further claim against Mr and Mrs Gillibrand as third parties, are described in my evaluation of those matters

Evaluation: (1) were duties of care owed by the defendants to the trustees?

Mr Swanepoel

[125] As earlier recorded, Mr Swanepoel contended that no duty of care was owed by him to Mr and Mrs Gillibrand, as trustees of the trust, before or after Gordon Gillibrand died because he did not act for the trustees in respect of the matters at issue at any time.

[126] In answer to this there was a contention for the plaintiffs that Mr Swanepoel was retained by Mr and Mrs Gillibrand on what was called a "general retainer" and that this put Mr Swanepoel under a duty to advise them on any matters of which he became aware and which would or might affect Mr and Mrs Gillibrand, or either of them, in respect of their affairs, including any matters relating to the trust. Ms Twomey objected to the argument, in respect of which there was no pleading, and submitted that in any event the concept of a general retainer is contrary to authority.[14] In closing submissions Ms Holland, for the plaintiffs, resiled from the very broad general retainer contention. I am satisfied that there is no basis, in fact or in law, for imposing on Mr Swanepoel the very broad duty of care contained in the concept of a general retainer as originally contended for.

[127] Mr Swanepoel placed some emphasis on the fact that there was no letter of engagement from the trustees on behalf of the trust in respect of the relevant matters. I do not accept that it can be concluded that Mr Swanepoel did not owe a duty of care to the trustees because there is no formal letter of engagement of Mr Swanepoel to act for them – for the trust – in respect of the matters at issue in this proceeding. The rules about letters of engagement are concerned with professional duties prescribed by statute, and subordinate rules, not whether a duty of care has arisen in a particular case in contract or in tort. The requirement under the Lawyers and Conveyancers Act 2006, and relevant rules, that lawyers obtain signed letters of engagement cannot be determinative of whether a lawyer is acting for a particular party, or whether a lawyer owes a duty of care to someone for whom the lawyer is not acting. If, as a matter of fact, a lawyer is acting for a party, but without obtaining a formal letter of engagement, the duty of care in contract will nevertheless exist. If a lawyer is not acting for a party, and that party is not a client, the lawyer may nevertheless owe a duty of care, in tort, to that party.

[128] In Mr Swanepoel's case I am satisfied that, as a matter of fact, he was at all material times acting for Mr and Mrs Gillibrand, as trustees of the trust, in respect of the matters at issue for the trust in this proceeding. My reasons are set out in the following paragraphs. I am also satisfied that Mr Swanepoel would, in any event,

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[14] Citing *Midland Bank v Hett, Stubbs & Kemp* [1979] Ch 384 at 402.

owe a duty of care in tort to the trustees. This is on well settled principles applied to the facts of this case.

[129] The first letter of engagement was prepared by Mr Swanepoel having regard to the instructions he had received in December 2009 about the problem with the resthome fees, but without Mr and Mrs Gillibrand telling him about the trust debt. The letter of engagement was prepared with reference only to the December 2009 instructions. At the December 2009 meeting the Gillibrands had not mentioned the trust debt. Mr Swanepoel only found out about it after reviewing the trust's files on receiving them from the Gillibrands' former solicitors in about February 2010. Mr Swanepoel's evidence was that he immediately realised that this was likely to cause a problem in obtaining a resthome subsidy for Gordon Gillibrand – the subject matter of the letter of engagement. This difficulty was confirmed on enquiries Mr Swanepoel made of WINZ. He then discussed the difficulties with Mrs Gillibrand. I am satisfied that, from that point, Mr Swanepoel assumed a responsibility to give advice to the Gillibrands about the ramifications for the trust of the debt to Gordon Gillibrand and, in particular, the fact that this appeared to be the sole remaining asset of Gordon Gillibrand. And I am satisfied that the trustees looked to him and relied on him for that advice.

[130] The evidence I accept makes clear that, from that point, and continuing after Gordon Gillibrand died to the end of the dispute with Bupa, Mr Swanepoel did advise the trustees on issues relating to the trust debt and on possible ways to get the Bupa fees paid, or secured, without the trust being required to repay some of the trust debt. And Mr and Mrs Gillibrand, as Mr Swanepoel knew, were relying on him to protect the interests of the trust. One of the primary instructions Mr Swanepoel had, and for which he assumed responsibility, was to advise whether the trust had liability for the debt, firstly to Gordon Gillibrand and then to the estate, and, if so, to advise on ways in which that liability might be avoided.

[131] This conclusion is reinforced by the fact that the power of attorney from Gordon Gillibrand to his son was revoked in February 2010, over 12 months before Gordon Gillibrand died. After the power of attorney was revoked Mr Gillibrand's instructions, as recorded in the formal letter of engagement, were at an end. The

responsibility to provide advice to Gordon Gillibrand had been transferred to Mr Spicer of Webb Ross. But Mr Swanepoel continued to provide advice to Mr and Mrs Gillibrand. This was advice to them in respect of all relevant matters relating to the trust debt. There were communications between Mr Swanepoel and Mr Spicer. This included advice from Mr Swanepoel about the trust debt. All of this culminated in Mr Swanepoel's letter of 8 April 2011 to Bupa. This letter records beyond any reasonable argument that Mr Swanepoel was acting for the trustees and that he had clearly been acting in that capacity at least from the date that the power of attorney was revoked.

[132] Mr Swanepoel's instructions to advise the trustees were not withdrawn at any relevant time after Gordon Gillibrand died. Clear evidence of the fact that Mr Swanepoel was acting for the trustees as well as the estate is his letter to Bupa sent on 2 March 2012. The letter was drafted as one conveying instructions received by Mr Swanepoel on behalf of the estate, and a letter in that form is understandable. But the evidence in respect of the content of the letter, and in particular advice to Bupa that the trustees did not recognise a debt to the estate, makes clear that Mr Swanepoel was getting instructions from the Gillibrands as trustees as well as from Mr Gillibrand as executor, and that he was advising the trustees in relation to the debt. It is because of a difference between Mr Swanepoel's advice as to whether the trust still had liability for the debt, and the Gillibrands' apparent contentions that there was no liability, that Mr Swanepoel advised the trustees to take independent advice on that particular issue. Notwithstanding Mr Swanepoel's recommendation that the trustees take independent advice, there is no evidence that they did, and there is a substantial body of evidence that Mr Swanepoel continued to provide advice to the Gillibrands as trustees in relation to the debt.

[133] Mr Swanepoel's evidence was that it was not until February 2012 that Mr and Mrs Gillibrand suggested that the trust debt had been forgiven. I accept Mr Swanepoel's evidence on this point, and his evidence that he was "amazed" that this proposition had not earlier been raised. As already recorded, Mr Swanepoel remained of the opinion that the trust was liable to the estate for the debt. A major complication had been added with the contention from the trustees that there was no debt, but this did not bring to an end Mr Swanepoel's acceptance of a professional

responsibility to advise the trustees. He did not decline to continue to act for the trustees. The fact that he accepted new instructions to advise Mr Gillibrand as executor did not bring responsibilities to the trust and the trustees to an end.

[134] What did change, following Gordon Gillibrand's death, was that the issue for the trust became more complicated because one of the trustees was also the executor. This added to the extent of the duty of care Mr Swanepoel owed to the trustees. He was acting for two parties and their interests in law were not aligned, but their personal interests were.

[135] I am satisfied that Mr Swanepoel did owe a duty of care to the trustees. It is unnecessary to determine whether that was a duty of care in contract or in tort, and neither counsel sought to develop any substantial argument in that regard.

Mr Holgate

[136] For reasons broadly similar to those recorded in relation to Mr Swanepoel, and flowing on from that conclusion, I am satisfied that Mr Holgate had a duty of care to the trustees arising out of his direct instructions to act for Mr Gillibrand, as executor, on the removal application. This is borne out by the evidence of the advice that was given by Mr Holgate, and by considerations of proximity, foreseeability, assumption of responsibility, and reliance. Of considerable importance in relation to the question as to whom Mr Holgate owed duties of care, is the fact that the change of strategy he developed, with the second opposition and the introduction of the mistreatment allegations, was to seek to advance the common interests of the trustees and of Mr Gillibrand personally, as a beneficiary of the estate, without Mr Gillibrand having to relinquish his separate interest as executor of the estate.

[137] There is also the fact that Mr Holgate in his counterclaim expressly pleaded that there was a contract between him and Mr and Mrs Gillibrand. This is explained in my evaluation of the counterclaim. The contract Mr Holgate alleges existed can only have been with the Gillibrands as trustees.

Evaluation: (2) was there breach of duty?

[138] I will assess the allegations of breach in relation to the two main topics – the trust debt issue and the mistreatment allegations. The way in which Mr Swanepoel and Mr Holgate advised the plaintiffs on the question of conflict is addressed under each heading.

[139] Before assessing the allegations of breach I will record my conclusions on issues of credibility. It is also appropriate to note the legal principles relevant to the question of breach of the duty arising on the facts of this case.

Credibility

[140] As earlier noted, there was conflicting evidence on a substantial number of topics, but I was satisfied that many of the matters in issue were, in the end, not relevant at all, or not relevant to the central issues. For this reason I do not intend to assess credibility on issues of that nature. The conflicts of evidence of consequence, and requiring a credibility assessment, are those relating to the present topic – whether there was a breach of a duty of care.

[141] Where there is a conflict of evidence between Mr and Mrs Gillibrand on the one hand, and Mr Swanepoel or Mr Holgate on the other, with this evidence bearing in a material way on the question of breach of duty, I prefer the evidence of Mr Swanepoel and Mr Holgate.

[142] A principal reason for my conclusion is that there is a substantial number of inconsistencies between material contentions of Mr and Mrs Gillibrand in their statement of claim and, more importantly, their briefs of evidence – and especially the brief of evidence of Mr Gillibrand – and what each of them said on these matters in cross-examination. These inconsistencies cannot reasonably be attributed to understandable difficulty in remembering a particular matter, or to the pressure of being in a courtroom under cross-examination, or other matters which may bear on the reliability of the evidence as opposed to the credibility of the witness. In addition, positive assertions of Mr Gillibrand, or Mrs Gillibrand, on central issues are inconsistent with contemporaneous documents. And some of those documents

are ones which one, or both, of the Gillibrands approved in draft or, less often, themselves produced. And there are positive assertions of Mr Gillibrand or Mrs Gillibrand which are simply not plausible.

[143] I will note some only of the evidence which I am unable to accept. Ms Twomey, as part of her closing submissions for Mr Swanepoel, produced five schedules on different topics. These record in some detail the evidence of Mr Gillibrand and Mrs Gillibrand which Ms Twomey submitted is not credible, generally because of inconsistencies between evidence-in-chief and evidence in cross-examination. I accept the general accuracy of the schedules. These summarise the evidence of Mr Gillibrand and Mrs Gillibrand in his or her brief of evidence (except on one topic where there was no comment from Mrs Gillibrand) on the five topics and compare this with evidence in cross-examination. The five topics are: evidence regarding the ability and willingness of Mr and Mrs Gillibrand to pay the Bupa debt (which includes payment to the estate for that purpose); evidence as to whether the Gillibrands were advised that the Bupa debt was not payable; evidence as to whether the trust debt had been forgiven, and in particular when Mr Swanepoel was advised of this contention; evidence relating to the mistreatment allegations; and evidence of advice to Mr and Mrs Gillibrand on the question whether Mr Gillibrand as executor had a conflict of interest. I will expand on a small part of this.

[144] In respect of the trust debt, I am satisfied that the contentions of Mr and Mrs Gillibrand that a debt was not owed by the trust to Gordon Gillibrand, and then to his estate, are not credible. My conclusions on issues relating to Mr Swanepoel's advice on this topic are below, and some of the evidence discussed there and my findings, bear on the credibility of Mr and Mrs Gillibrand.

[145] Another central issue concerned advice given by Mr Swanepoel on whether there was a conflict of interest because of the trust debt issue. Mr Gillibrand said in his brief of evidence:

> Mr Swanepoel never told me that by continuing as the executor I was in a conflict situation in respect to my position as a trustee of the trust due to the trust owing the estate money.

[146] This evidence is patently false. Amongst other things:

(a) The first opposition, and Mr Gillibrand's first affidavit, both drafted by Mr Swanepoel with Mr Gillibrand's full instructions, in substance amounted to an application to the Court for directions on how to proceed because of the conflict of interest.

(b) The first Court conference on the removal application was on 10 October 2012, six days after Mr Gillibrand swore his affidavit. Mr Gillibrand attended the conference with Mr Swanepoel. What occurred makes plain beyond argument that Mr Swanepoel had, before the conference, advised Mr Gillibrand that there was a conflict, that Mr Swanepoel and Mr Gillibrand discussed the fact of the conflict with the Judge, and that in the course of the adjournment Mr Swanepoel again explained to Mr Gillibrand why there was a conflict. Following the adjournment Mr Gillibrand accepted that the conflict justified the appointment of the Public Trust as an additional and independent trustee to investigate whether the trust debt was still due and related issues.

[147] There were issues relating to the advice given by Mr Swanepoel as to whether the Bupa debt was owing. Mr Gillibrand said in his brief of evidence:

> I relied on Mr Swanepoel's advice that I had to oppose Bupa's application to have me removed as the executor. … Mr Swanepoel told me that the Bupa debt was not due. Mr Swanepoel never told me why he put in my affidavit of 4 October 2012 that I acknowledged the Bupa debt.

[148] This evidence is not credible. In relation to Mr Swanepoel's own opinion, quite apart from what he said in his evidence, what Mr Gillibrand asserts is directly contrary to what Mr Swanepoel recorded in the first opposition, a document signed by Mr Swanepoel: "The executor recognises the debt owing to BUPA …". As Mr Gillibrand recognised in his brief of evidence, it is also directly contrary to what Mr Gillibrand acknowledged in the affidavit. Mr Gillibrand's evidence that Mr Swanepoel never told him why he put the statement in the affidavit is disingenuous. He sought to distance himself from the implications of what he had sworn to. And

this was an affidavit which Mr Gillibrand acknowledged he had read, unlike the second affidavit which I come to below.

[149] Mr Gillibrand's evidence on these matters also cannot be reconciled with contemporaneous documents recording advice plainly given to Mr Gillibrand, and Mrs Gillibrand, by Mr Holgate, before the change of strategy with the mistreatment allegations. Mr Holgate's advice at that point was consistent with the advice of Mr Swanepoel.

[150] Mr Gillibrand's seeking to distance himself from the implications of what he had said in contemporaneous documents, or from written advice to him, and often also to Mrs Gillibrand, in contemporaneous documents, continued in relation to his second affidavit. Mr Gillibrand said in his brief of evidence:

> Mr Holgate walked me over to the Court for me to swear the affidavit. Mr Holgate did not advise me to read the affidavit. Rather, he told me what he had written and that he would take me to the courthouse to have it sworn. I did not read the affidavit. I regret not doing so but I was simply following Mr Holgate's instructions to me and I believed he was acting in my best interests.

[151] Mr Gillibrand was plainly seeking to convey that he had no opportunity to read the affidavit and, as expressly recorded, that there was no advice from Mr Holgate to read it. In cross-examination of Mr Gillibrand, Mr Holgate asked Mr Gillibrand whether he, Mr Holgate, had given the affidavit to Mr Gillibrand to read. Mr Gillibrand said he had. When the brief of evidence, and the answer to Mr Holgate, are read in conjunction with cross-examination of Mr Gillibrand by Ms Twomey on the matter, and questions from me to Mr Gillibrand, I am satisfied that what Mr Gillibrand said in his brief of evidence is, at the least, intentionally misleading or evasive.

[152] There is another consideration arising from Mr Gillibrand's evidence about the second affidavit. In answer to a question from me, Mr Gillibrand said that he swore that the content of the affidavit was true even though he had not read it. Whether he read it or not does not alter the conclusions that I have already recorded on credibility and, in consequence, my conclusion that the evidence of Mr Holgate on the matters in issue is to be preferred. In particular, I am satisfied that the content

of the affidavit, on questions of fact, was based on instructions from Mr Gillibrand (and to an extent Mrs Gillibrand) to Mr Holgate. The further consideration is that, if Mr Gillibrand chose not to read the affidavit produced from those instructions, but nevertheless swore that the content was true, this does not reflect well on Mr Gillibrand.

Breach of duty: relevant legal principles

(1) The standard of care

[153] At a general level, the standard of care required to be exercised both by Mr Swanepoel as a solicitor and Mr Holgate as a barrister, and whether arising because of a contractual relationship with one or both of the plaintiffs, or in tort, was the same.

[154] In Dal Pont, *Lawyers' Professional Responsibility*, the standard at general law is outlined as follows:[15]

> At general law, the relevant standard of care is "that of the ordinary skilled person exercising and professing to have that special skill. Translated to the lawyer-client context, it is one of a qualified, competent and careful lawyer in the circumstances in the practice of her or his profession. As a lawyer is only liable for the use of "ordinary" care and skill, the standard of care provide no guarantee against all mistakes or omissions. So a lawyer is not negligent merely for committing an error of judgment, unless that error is gross. There are manifold uncertain or difficult areas of the law, and so the expression of an opinion or the giving of advice by a lawyer does not normally constitute a promise that the opinion or advice is correct. It follows that cases will be lost notwithstanding that the lawyer has been diligent and careful; an unfavourable outcome, whether or not in litigation, is not per se evidence of negligence.

[155] Although that discussion is directed to the general law, the standard is generally the same under the Consumer Guarantees Act 1993, which will apply where services are supplied by a lawyer to a client (and whether or not there is a formal letter of engagement). The relevant requirement in the Consumer Guarantees Act is that the service is carried out with reasonable care and skill. Similarly, under the New Zealand Law Society Rules of Conduct and Client Care, a lawyer is

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[15] G E Dal Pont *Lawyers' Professional Responsibility* (6th ed, Lawbook Co, Sydney, 2017) at [5.165] (footnotes omitted).

required to take reasonable care and to act competently and in a timely fashion in providing services to clients.[16]

(2) Acting on client's instructions

[156] In general, it is the duty of a lawyer to comply with instructions from the client. The general principles are summarised in *Jackson & Powell on Professional Liability* as follows:[17]

> **Duty to obey client**. The solicitor will be in breach of duty if he does not follow his client's instructions. Indeed, it is in general the client's privilege, if he so wishes, to mismanage his affairs. He is entitled to pursue litigation with little prospect of success, to lend on insufficient security, or to enter an unwise bargain, if he so chooses. The solicitor has a duty to advise on the legal hazards of the transaction, but no more:
>
> > "It was the duty of the solicitor to inform and advise, ensuring that the information and advice was understood by the client. It was not part of his duty of care to force his advice on the client."[18]

[157] The Privy Council in *Harley v McDonald* described the duty from the client's perspective as follows:[19]

> As a general rule litigants have a right to have their case presented to the court and to instruct legal practitioners to present them on their behalf. … And on the whole it is in the public interest that litigants who insist on bringing their cases to court should be represented by legal practitioners, however hopeless their cases may appear.

[158] The Privy Council approved a statement of Sir Thomas Bingham MR in *Ridehalgh v Horsefield* which has some direct application on the facts of the present case:[20]

> Legal representatives will, of course, whether barristers or solicitors, advise clients of the perceived weakness of their case and of the risk of failure. But clients are free to reject advice and insist that cases be litigated. It is rarely if ever safe for a court to assume that a hopeless case is being litigated on the advice of the lawyers involved. They are there to present the case; it is … for the judge and not the lawyers to judge it.

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16 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, Sch, r 3.

17 J L Powell QC and R Stewart QC (gen eds) *Jackson & Powell on Professional Liability* (8th ed, Sweet & Maxwell, London, 2017) at [11-124] (footnotes omitted).

18 *Dutfield v Gilbert H Stephens and Sons* [1988] 18 Fam Law 473.

19 *Harley v McDonald* [2002] 1 NZLR 1 (PC) at [67].

20 *Ridehalgh v Horsefield* [1994] Ch 205 at 234; cited in *Harley v McDonald*, above n 19, at [57].

(3) Standard of care for advice on risk

[159] Where a proposed course of action by a client involves risk, whether in litigation or otherwise, in general a lawyer is bound to give advice to the client that there is risk, and the general nature of that risk, but usually is not required to go into all the details of the risk. In *Frost & Sutcliffe v Tuiara* the Court of Appeal summarised the general rule, in reference to the facts in that case, as follows:[21]

> … Mr Sutcliffe also advised the Tuiaras that if RTH could not reconvey they would lose their home. We do not consider the duty of reasonable skill and care required Mr Sutcliffe to go into all the intricacies of how things could go wrong. …

[160] To similar effect, Lord Carswell said, in *Moy v Pettman Smith (a Firm)*:[22]

> Nor do I consider that to give clients a catalogue of every factor which might affect the cause of action to be adopted … would be productive discharge of advocates' duty to give them proper advice.

(4) Acting on counsel's advice

[161] Mr Swanepoel says that he was not negligent because, amongst other things, from the time that Mr Holgate was instructed as counsel, Mr Swanepoel acted properly in reliance on Mr Holgate's advice to him.

[162] The Court of Appeal in *Harley v McDonald* provided a succinct summary of the defence of reliance on counsel's advice:[23]

> Ordinarily the advice of counsel will be a powerful factor upon which solicitors can rely, but only if the advice comes in properly reasoned form and the solicitor is satisfied, after appropriate consideration, that the advice is tenable: ... This does not mean that solicitors must replicate the consideration which counsel has given to the matter; obviously not because the solicitor will not usually have the experience or the skills possessed by the barrister.

[163] The Court cited four authorities: *Davy-Chiesman v Davy-Chiesman*, *Locke v Camberwell Health Authority*, *Ridehalgh v Horsefield*; and *Yates Property*

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21 *Frost & Sutcliffe v Tuiara* [2004] 1 NZLR 782 (CA) at [28].
22 *Moy v Pettman Smith (a firm)* [2005] UKHL 7, [2005] WLR 581 at [60].
23 *Harley v McDonald* [1999] 3 NZLR 545 (CA) at [85].

Corporation (in liquidation) v Boland.[24] To explain the scope of the defence it will be sufficient to cite passages from *Locke* and *Ridehalgh* and from the High Court of Australia on an appeal from *Yates Property Corporation*, and one other authority.

[164] In *Locke v Camberwell Health Authority* the Court of Appeal of England and Wales summarised the principles as follows:[25]

> (1) In general, a solicitor is entitled to rely upon the advice of counsel properly instructed.
>
> (2) For a solicitor without specialist experience in a particular field to rely on counsel's advice is to make normal and proper use of the Bar.
>
> (3) However, he must not do so blindly but must exercise his own independent judgment. If he reasonably thinks counsel's advice is obviously or glaringly wrong, it is his duty to reject it.
>
> (4) Although a solicitor should not assist a litigant where prosecution of a claim amounts to an abuse of process, it is not his duty to attempt to assess the result of a conflict of evidence or to impose a pre-trial screen on a litigant's claim.
>
> …

[165] In *Ridehalgh v Horsefield*:[26]

> A solicitor does not abdicate his professional responsibility when he seeks the advice of counsel. He must apply his mind to the advice received. But the more specialist the nature of the advice, the more reasonable is it likely to be for a solicitor to accept it and act on it.

[166] In *Boland v Yates Property Corporation Pty Ltd* Kirby J said:[27]

> Ordinarily in a divided legal profession it is responsible conduct for a solicitor (particularly if he or she has no disclosed specialist experience in a field of legal practice) to rely upon a competent barrister's advice. Doing so makes proper use of the specialised Bar. However, the solicitor must not accept the barrister's advice blindly. He or she retains a legal duty to the client, separate, independent and personal, both by reason of the general law of negligence and the contract of retainer. The solicitor must exercise independent judgment to the extent that it is reasonable to demand this having regard to the solicitor's reputed knowledge and experience, the complexity of the case and the skill and experience of the barrister who has

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[24] *Davy-Chiesman v Davy-Chiesman* [1984] Fam 48 (CA); *Locke v Camberwell Health Authority* [2002] Lloyd's Rep PN 23 (CA); *Ridehalgh v Horsefield*, above n 20; and *Yates Property Corporation (in liq.) v Boland* (1998) 85 FCR 84 (Full Federal Court), (1998) 157 ALR 30.

[25] *Locke v Camberwell Health Authority*, above n 24, at 29-30.

[26] *Ridehalgh v Horsefield*, above n 20, at 237.

[27] *Boland v Yates Property Corporation Pty Ltd* [1999] HCA 64, (1999) 74 ALRJ 209 at [142].

> been retained. If the solicitor reasonably considers that the barrister's advice is obviously wrong, it is the solicitor's duty to reject that advice and to advise the client independently, including as to the wisdom of retaining a fresh barrister.

[167] In addition, in *Langsam v Beachcroft LLP* the Court said:[28]

> [T]he independent judgment which the solicitor should apply when considering whether the advice of counsel is "obviously or glaringly wrong" is a judgment informed by his or her specialist expertise. But subject to that test, I hold that where the advice is given by appropriate counsel specialised in the field who has been properly instructed, even an experienced and specialised solicitor is entitled to be guided by counsel's advice.

The trust debt issue: was there breach by Mr Swanepoel?

[168] At the heart of this issue is the contention that Mr Swanepoel negligently advised Mr and Mrs Gillibrand that the trust had no liability to Gordon Gillibrand or to his estate. There was no negligence because no such advice was given. The preceding discussion about credibility provides some reasons for this conclusion, but it is appropriate to expand on this because this allegation of negligence is central to the plaintiffs' case.

[169] The contention that negligent advice of this nature was given in the period before Gordon Gillibrand died is untenable, and to the extent that the allegation should not have been made. The pleading of negligent advice before Gordon Gillibrand died was, or included, a contention that Mr Swanepoel negligently advised that it was *arguable* that the trust debt had been forgiven. I am also satisfied that there was no advice to that effect.

[170] Mr Swanepoel's letter of 8 April 2011 to Bupa is sufficient to establish that there was no advice from Mr Swanepoel, before Gordon Gillibrand died, that the trust debt was not payable. As earlier recorded, the content of the letter was approved in advance by Mr and Mrs Gillibrand. The presently material part of it is an express statement that Mr and Mrs Gillibrand, plainly speaking as trustees through Mr Swanepoel, accepted that there was a debt owed by the trust to Gordon Gillibrand.

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[28] *Langsam v Beachcroft LLP* [2011] EWHC 1451 (Ch) at [137]. The decision was upheld on appeal: *Langsam v Beachcroff LLP* [2012] EWCA Civ 1230.

[171] Mr Swanepoel's evidence was that he was not told by Mr and Mrs Gillibrand until around February 2012 that Gordon Gillibrand had forgiven the trust debt and that he was also advised then, or soon after, that Gordon Gillibrand had forgiven the trust debt in about 2006. I accept Mr Swanepoel's evidence.

[172] The evidence that the trust debt had been forgiven in 2006 is implausible given other evidence, in addition to what is plainly recorded, with the trustees' authority, in Mr Swanepoel's letter of 8 April 2011. There is the incontrovertible fact that, up to around 2009, the trust repaid $150,000 to Gordon Gillibrand by paying resthome fees totalling that sum and crediting those payments against the debt. Given the quantum of the payment by the trust over this period, I am also unable to accept that Mr and Mrs Gillibrand, as they appeared to contend, had somehow forgotten until 2012 that Gordon Gillibrand had forgiven the debt in 2006.

[173] The plaintiffs' evidence about forgiveness of the debt, presented as a foundation for the contention that negligent advice was given by Mr Swanepoel as to the existence of the debt, is also inconsistent with the financial statements for the trust for the years ending 31 March 2009, 2010 and 2011, all of which record a debt to Gordon Gillibrand of $355,000. The financial statements for the trust for the year ended 31 March 2012 indicated, for the first time, that no debt was owed to Gordon Gillibrand (at that point, technically, to his estate). The evidence from Mr and Mrs Gillibrand was that the change in the statements was made at the direction of ASB Bank. This evidence is not credible. Mr and Mrs Gillibrand denied that they gave instructions to the trust's accountants to make the change. This evidence also is not credible. The compilation report and disclaimer in the financial statements records that the financial statements were based on information provided by the client.

[174] The first contention advanced by Mr Swanepoel that the trust debt might not be payable was made, on his clients' behalf, in the first opposition. Mr Gillibrand's affidavit in support recorded the position in decidedly equivocal terms: "I have approached the trustees of the Trust with regard to the Bupa Debt and they reminded me of the promise that the debt was not to be called up". Mr Gillibrand did not say when the discussion with "the trustees" occurred, but the implication is that it was around the time that the affidavit was prepared, or at least not long before.

[175] The steps taken by Mr Swanepoel, after he had been instructed that the debt had been forgiven and that the trustees in consequence wished to resist any payment to the estate, and with Mr Gillibrand as executor in turn resisting payment to Bupa on the grounds of insolvency, were not negligent steps for Mr Swanepoel to recommend in light of the instructions he had. And, contrary to an important part of the contentions of the plaintiffs, Mr Swanepoel was not himself making any positive assertion that the trust debt was not recoverable by the estate. He did draft and file the first opposition to the removal application, but the substance of this was an application for directions from the Court to deal with the conflict that had arisen for Mr Gillibrand, and the uncertainty only recently raised by the plaintiffs as to whether there was any liability to the estate. This approach by Mr Swanepoel was clearly reflected in the proposals that were put to Heath J and which resulted in the order appointing the Public Trust as an additional and independent trustee of the estate for the purpose of investigating whether the trust debt was payable to the estate and, if so, whether the trust had any assets to enable payment to be made.

[176] Two other matters should be noted. I am satisfied that the steps taken by Mr Swanepoel were taken because of advice from the plaintiffs that, quite apart from the contention that the trust debt had been forgiven, the trust either did not have funds sufficient to meet the Bupa debt, or they were unwilling to use funds or other assets that became available. This is discussed in a little more detail when considering causation in respect of the claim against Mr Holgate, but it is relevant also to my conclusion that there was no negligence by Mr Swanepoel in the approach he took. Because of the instructions he was given Mr Swanepoel sought to delay or deflect the Bupa claim because it would have a real impact on the trust.

[177] The second matter to be noted is the observation of Heath J in the costs decision that, up to the time of Mr Holgate's letter to Gibson Sheat of 15 March 2013, "sensible steps appear to have been taken to resolving the litigation".[29] The steps up to then included all of the steps that had been taken by Mr Swanepoel, and the first steps taken by Mr Holgate, all of this relating to the first main topic as I have identified it – the trust debt issue – and the question of a conflict of interest that arose from the trust debt issue.

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[29] *Bupa Care Services NZ Ltd v Gillibrand*, above n 6, at [22].

[178] After that Mr Holgate, without consultation with Mr Swanepoel, following instructions received directly from the plaintiffs, introduced the major shift in the approach on behalf of the plaintiffs when their mistreatment allegations were advanced.

[179] The plaintiffs have not established that there was negligence on the part of Mr Swanepoel in respect of any matter relating to the trust debt issue, which includes advice he gave on the question whether Mr Gillibrand had a conflict of interest as executor.

The trust debt issue: was there breach by Mr Holgate?

[180] The heart of the allegation of negligence by Mr Holgate in relation to the trust debt issue was that he failed to advise the plaintiffs that Mr Swanepoel's advice that the trust had no liability to the estate was incorrect advice, and that he negligently failed to give the correct advice in that regard. Because I have concluded that there was no negligence by Mr Swanepoel on the trust debt issue, there could be no negligence by Mr Holgate as alleged.

[181] In addition, and positively in relation to Mr Holgate's defence, it is clear from Mr Holgate's memorandum of 5 November 2012 that the initial advice from him to the plaintiffs was consistent with the competent advice that had up to that point been given by Mr Swanepoel to the plaintiffs. Mr Holgate's advice remained the same, on the trust debt issue, and on the need for Mr Gillibrand to stand down because of the conflict of interest, until the change of strategy with the mistreatment allegations.

The mistreatment allegations: was there breach by Mr Holgate?

(1) Introduction

[182] It is appropriate to consider whether Mr Holgate breached his duty of care in relation to the mistreatment allegations before considering the same question in relation to Mr Swanepoel. This is for two reasons. First, because the mistreatment allegations were introduced as a defence to the removal application on Mr Holgate's advice to Mr and Mrs Gillibrand, without notice to Mr Swanepoel. Second, Mr

Holgate's involvement as counsel from that point altered the extent of the duty of care that had been owed by Mr Swanepoel to the plaintiffs up to that point. The principal duty of care owed to the plaintiffs now rested with Mr Holgate.

[183] I have concluded that Mr Holgate failed to meet the duty of care he owed to the plaintiffs in his handling of the opposition of the removal application. There was negligence – meaning breach of the duty of care – by Mr Holgate in three main respects:

(a) Contrary to the advice he gave to Mr and Mrs Gillibrand, the mistreatment allegations did not provide grounds to resist the application for Mr Gillibrand to be removed as executor.

(b) Mr Holgate should not have filed the documents which contained the mistreatment allegations without first ensuring that the evidence said to be available to support these allegations was in fact available and before the Court.

(c) Mr Holgate lacked reasonable objectivity and failed to exercise reasonable judgment.

(2) Mistreatment allegations not grounds to oppose removal

[184] Mr Holgate's advice to Mr and Mrs Gillibrand was that the mistreatment allegations provided good grounds for Mr Gillibrand to resist the removal application. In my judgment that advice was wrong and should not have been given. Heath J came to a similar conclusion in the costs decision when he observed that "the allegations in relation to Bupa's care were never relevant to the application to remove Mr Gillibrand as an executor".[30] Given the fact that in this proceeding there are issues of negligence as between the plaintiffs and the defendants, rather than the costs issue addressed by Heath J, it is necessary to record the reasons for my independent conclusion.

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[30] *Bupa Care Services NZ Ltd v Gillibrand*, above n 6, at [27], cited above at [84].

[185] The fact that Mr Holgate advised Mr and Mrs Gillibrand that the mistreatment allegations provided good grounds for opposition is established, notwithstanding my general findings against Mr and Mrs Gillibrand on matters of credibility. There are several pieces of evidence, or circumstances, independent of the conflict of evidence between Mr and Mrs Gillibrand on the one hand, and Mr Holgate on the other, relating to the nature of the advice he gave and which provide adequate grounds for my conclusion.

[186] Of some significance is the fact that contemporaneous documents of Mr Holgate, and various steps actually taken by Mr Holgate at the time which are not in contention, demonstrate a marked change in the nature of the advice Mr Holgate was giving. The most material comparison is between Mr Holgate's memorandum to Mr Swanepoel of 5 November 2012 and the subsequent proposal to Bupa that the Public Trust be appointed, compared with the documents relating to the introduction of the mistreatment allegations and court documents and correspondence that followed. The correspondence is that between Mr Holgate and the plaintiffs and between Mr Holgate and Gibson Sheat.

[187] The nature of the advice Mr and Mrs Gillibrand were getting is further demonstrated by the marked change in their own position. When the trust debt issue was the main focus, Mr Gillibrand had originally been reluctant to stand down as executor. But in due course he accepted the advice he got from Mr Swanepoel that he should stand down. As just noted, and recorded in the factual narrative, Mr Gillibrand accepted the same advice that he got from Mr Holgate when the question of conflict related to the trust debt issue. And it may be noted that the original advice from Mr Holgate, recorded in the memorandum of 5 November 2012, was advice to Mrs Gillibrand as well as to Mr Gillibrand. Once the mistreatment allegations became the main focus, Mr Gillibrand's very firm position was that he did not have to stand down. In this he was firmly supported by Mrs Gillibrand.

[188] It is clear that Mr and Mrs Gillibrand strongly believed, and perhaps had convinced themselves, that Bupa's treatment of Gordon Gillibrand had been particularly bad. But the extent to which the Gillibrands may have convinced themselves about these matters, a matter given emphasis by Mr Holgate as well as

Mr Swanepoel, does not bear on the present issue whether the mistreatment allegations provided grounds to oppose the removal application, as opposed to grounds to resist payment of the Bupa debt. As I have already recorded, and as Heath J found, the mistreatment allegations did not provide grounds to oppose the removal application. The introduction of the mistreatment allegations did not somehow remove the conflict of interest which Mr Holgate had recognised existed and which Mr Gillibrand had acknowledged required him to stand down.

[189] I am satisfied that, had Mr Holgate advised Mr Gillibrand that the conflict of interest remained and he should stand down, Mr Gillibrand would have done what he did before and, whether reluctant or not, he would have accepted that advice. I am further satisfied that he would have been supported by Mrs Gillibrand. And I am satisfied that this would have occurred notwithstanding the documents that Mr and Mrs Gillibrand sent to Campbell Live, and for which they were personally responsible and which can only be described as outrageous. There was an alternative legal means already available to Mr and Mrs Gillibrand to seek to resist payment of the Bupa debt and ventilate the mistreatment allegations in court. This was through defence to the Bupa debt proceeding by seeking to be joined as parties or the proposed application by Mr Gillibrand for declaratory orders in respect of the quality of the treatment, an application proposed by Mr Holgate, or both.

(3) Absence of evidence to support mistreatment allegations

[190] The evidence establishes that Mr Holgate, without any input from Mr Swanepoel, had responsibility for drafting the second and third oppositions. These contain very specific allegations against Bupa of a particularly serious nature. As stated by Gibson Sheat, in their letter to Mr Holgate of 30 May 2013, the allegations amounted to imputations of a criminal nature and could not be more serious.

[191] In my judgment, Mr Holgate was negligent in advising the plaintiffs to maintain the mistreatment allegations as grounds to oppose the removal application and to do so up to the court hearing on that application. The breach of the duty here was to the plaintiffs. It is distinct from the professional duty owed by Mr Holgate to which Gibson Sheat referred.

[192] Given the nature of the allegations, in my judgment this was a case where Mr Holgate was bound to have given reasonably detailed advice to Mr and Mrs Gillibrand of the nature of the risks involved in maintaining these allegations if adequate evidence in support of them was not before the Court when the removal application was heard. There is no evidence of such advice having been given by Mr Holgate to Mr and Mrs Gillibrand. The evidence goes no further than general advice to the essential effect that there is always risk with litigation and, if Mr Gillibrand was not successful in his opposition to the removal application, there was likely to be a costs order against Mr Gillibrand. As recorded in the summary of relevant principles, in general a lawyer is not required to go into details of the elements of the risk. The application of the general rule depends on the circumstances. Here, in essence, to maintain the mistreatment allegations through to the hearing was a high risk strategy, because of the nature of the allegations, and because the adverse consequences of failure were almost bound to be higher than the adverse consequences that would follow in the normal course of events if a reasonable argument advanced in court is unsuccessful.

[193] The conclusion I have come to is that the advice on risk from Mr Holgate to Mr and Mrs Gillibrand not only failed to alert them to the high risk, which plainly included a high risk of an indemnity costs order against Mr Gillibrand, but in fact led them to believe that there was at the least a good prospect of success.

[194] Mr Holgate contended that he got advice from Mr and Mrs Gillibrand that adequate evidence in support of the mistreatment allegations was available and that they were collecting it. Mr Holgate submitted that, given that advice, there was no negligence by him in recording the allegations in the oppositions and then filing them, together with the second and third affidavits from Mr Gillibrand.

[195] This does not assist Mr Holgate on the question whether he was negligent. This is because the risk to Mr and Mrs Gillibrand, as opposed to the risk to Mr Holgate in respect of his separate professional obligations, was not in initially making the allegations without evidence, but in maintaining them through to the hearing when there was no evidence. The evidence establishes that Mr Holgate had become aware, some considerable time before the hearing of the removal

application, that Mr and Mrs Gillibrand simply did not have the evidence that they may have suggested they did have. The last affidavit filed in support of the mistreatment allegations (as part of the opposition to the removal application) was filed on or about 21 June 2013. It did not remotely support the allegations. There was no advice from Mr Holgate to Mr and Mrs Gillibrand, once this affidavit had been filed, which was seemingly the last piece of evidence that was going to come, that they should withdraw the mistreatment allegations as grounds to oppose the removal application because of the high risk involved.

[196] As recorded in the costs judgment of Heath J, evidence eventually relied on to support the allegations "went nowhere near creating a foundation for the serious allegation that the standard of Bupa's care had caused Mr Gillibrand snr's death".[31] Mr Holgate, as counsel who appeared for Mr Gillibrand at the substantive hearing on the removal application, was negligent in advancing this claim because he should have known that it could not possibly succeed. Mr Holgate did not have instructions from Mr Gillibrand that he was bound to proceed with an argument that could not succeed and which, for that reason, was bound to result in a substantial order for costs against Mr Gillibrand.

(4) Mr Holgate's lack of reasonable judgment and objectivity

[197] Mr Holgate, in giving advice to Mr and Mrs Gillibrand, as part of his duty of care was bound to exercise reasonable judgment and objectivity. Mr Holgate regrettably fell below the necessary standard. The breach of his duty in this regard is relevant for the following reasons: in my assessment, the way in which Mr Holgate approached the mistreatment allegations lacked balance; this materially influenced Mr and Mrs Gillibrand in deciding, in effect, to go for broke with the mistreatment allegations; and, for reasons I will come to, it also influenced Mr and Mrs Gillibrand to ignore the more cautious advice from Mr Swanepoel.

[198] These general considerations are borne out by Mr Holgate's written communications. The reference to Auschwitz in the draft letter to the Public Trust was the first example. The fact that, in the end, Mr Holgate agreed to remove the

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[31] *Bupa Care Services NZ Ltd v Gillibrand*, above n 6, at [26].

reference does not alter a conclusion that Mr Holgate lacked judgment. It appears that the letter would have been sent to the Public Trust unaltered if Mr Swanepoel's secretary had not referred the letter to Mr Swanepoel. A lawyer, if he thinks it will advance the client's case, is entitled to present the client's case forcefully. But the letter Mr Holgate proposed to send went well beyond forcefulness which might advance a client's case. And it was a harbinger of the way in which Mr Holgate approached the matter from that point. It required Mr Swanepoel's intervention, and as Mr Swanepoel described it "remonstration" with Mr Holgate, to get the Auschwitz reference removed.

[199] Mr Holgate's email to Mr and Mrs Gillibrand about this is also an indication of the lack of objectivity or independence from the client in terms of the advice being given. The manner in which Mr Holgate communicated with Mr and Mrs Gillibrand is indicative of a lawyer, in effect, stirring the pot with his clients. Mr and Mrs Gillibrand already had a strong antipathy to Bupa. They made this clear. And they made clear that they were looking for any means of avoiding any payment going from the estate to Bupa because they were looking for any means of avoiding any payment going from the trust to the estate. What was required from Mr Holgate, as the lawyer who by then, at the Gillibrands' insistence, had full charge of the matter, was moderating advice. They did not get it, at the outset, and they did not get it through to the conclusion of the removal application.

[200] Further examples of Mr Holgate's lack of judgment or lack of objectivity are contained in the factual narrative. There was the inexcusable statement to Gibson Sheat that they had a "blood-sucking client". There was the manner of expression of the allegations in the second and third oppositions for which there was no evidence. There was Mr Holgate's own initiative in releasing information to the Northern Advocate. In the email to the Northern Advocate, and in responses to the complaints from Gibson Sheat, Mr Holgate also indicated a lack of appreciation of the gravity of what was being alleged and, in terms of professional negligence, the implications for his clients. The responses to Gibson Sheat in fact indicate a marked lack of understanding of the issues.

(5) Mr Holgate's affirmative defences

[201] As earlier noted, Mr Holgate advanced seven affirmative defences. All but two of them have effectively been assessed in the course of the evaluation up to this point. One of the remaining affirmative defences is a contention of contributory negligence on the part of Mr and Mrs Gillibrand suing as the trustees. That affirmative defence is considered towards the end of this judgment when Mr Holgate's counterclaim against the trustees and his third party claim against Mr and Mrs Gillibrand are also considered.

[202] The remaining affirmative defence is a contention that the actions of the trustees amount to the torts of maintenance and champerty and, as a matter of public policy, those claims should be disallowed. This affirmative defence is appropriately considered at this point.

[203] Mr Holgate contends that the trustees funded Mr Gillibrand's defence of the removal application and Bupa debt proceeding. It is alleged that this asserted action of the trustees – funding of litigation – involved improper meddling in the proceedings "to try and achieve a result that suited" the trustees' own interests; that the trust "was meddling in matters where it had [no] legitimate business doing so".

[204] Mr Holgate did not seek to develop this submission to any extent. He simply cited a short passage from *The Law of Torts in New Zealand*, as follows:[32]

> How far the improper stirring up of litigation needs support from the law of torts no doubt is a matter for debate. Agreements involving maintenance or champerty are in any event unlawful and void unless the person assisting the proceedings has a bone fide interest in the litigation.

The authors cited *Giles v Thompson* in support of that statement.[33] Mr Holgate did not seek to draw any particular support for his argument from the decision of the House of Lords. He simply stated that "it is trite law".

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[32] Todd (ed) Hawes Cheer and Atkin *The Law of Torts in New Zealand* (7th ed, Thompson Reuters, 2016) at [18.4.01].

[33] *Giles v Thompson* [1994] 1 AC 142 (HL) at 153.

[205] I am not persuaded that either of the torts was committed. It is sufficient to provide another citation from *The Law of Torts in New Zealand* with concise definitions of the two torts:[34]

> The tort of maintenance is committed where a person, without lawful justification, assists a party to a civil action to bring or to defend the action, thereby causing damage to the other party. Champerty is that form of maintenance in which the person giving the assistance does so in consideration of his or her receiving a share of anything that may be gained as a result of the proceedings.

[206] The facts of this case do not come close to either of those torts. In addition, if I am wrong in that conclusion, I am satisfied, for reasons already recorded, that the trustees had a legitimate interest in both of the proceedings brought by Bupa. This affirmative defence is dismissed.

(6) Conclusion on Mr Holgate's negligence

[207] For these various reasons I am satisfied that Mr Holgate failed to meet the duty of care that he owed not only to Mr Gillibrand as executor, but also to Mr and Mrs Gillibrand as trustees. On the plaintiffs' claims that leaves, for consideration, the question whether Mr Holgate's breach of his duty caused any of the losses the plaintiffs claim and, if so, the calculation of that loss. Mr Holgate's cross-claims also require assessment. Those matters will be assessed after considering whether Mr Swanepoel breached his duty of care in respect of the mistreatment allegations.

The mistreatment allegations: was there negligence by Mr Swanepoel?

[208] In the statement of claim, in respect of the mistreatment allegations, there were in essence two broad pleadings of negligence against Mr Swanepoel.

[209] The first was that Mr Swanepoel failed to advise Mr and Mrs Gillibrand of Mr Holgate's intention to change strategy and file the second and third oppositions with the mistreatment allegations.

[210] There was no negligence as alleged because I accept Mr Swanepoel's evidence that he did not know, and had no reason to know, that Mr Holgate intended

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[34] Todd (ed) Hawes Cheer and Atkin *The Law of Torts in New Zealand*, above n 32, at [18.4.01].

to file a second opposition. Mr Swanepoel was unsure when he first became aware that the mistreatment allegations had been advanced in opposition to the removal application, but he believed it was after the third opposition was filed.

[211] The underlying premise of these contentions of Mr and Mrs Gillibrand is also disingenuous. The premise is that Mr and Mrs Gillibrand did not know that the mistreatment allegations were going to be pleaded before the second and third oppositions were filed. I am satisfied that, before Mr Holgate filed the second opposition, he had instructions from Mr Gillibrand, supported by Mrs Gillibrand, to advance the mistreatment allegations. The implicit allegation that Mr Gillibrand had no knowledge, in advance, that the third opposition was going to be filed is also not credible for the reasons discussed when considering credibility generally and Mr Gillibrand's evidence about the second affidavit which accompanied the third opposition.

[212] The second broad allegation against Mr Swanepoel was that he negligently failed to advise Mr and Mrs Gillibrand that the mistreatment allegations did not provide grounds to oppose the removal application. There was another allegation that he failed to advise them against pleading the mistreatment allegations, but that amounts to much the same thing.

[213] Mr and Mrs Gillibrand's evidence in support of this claim included the following contentions: the mistreatment allegations were initiated by Mr Swanepoel following his discussion with Mr Nola; Mr Swanepoel advised them that the mistreatment allegations provided grounds to oppose the removal application; Mr Swanepoel advised them that the mistreatment allegations had merit; Mr and Mrs Gillibrand were not themselves involved in any significant way in advancing the mistreatment allegations; they were guided by advice they got from Mr Swanepoel as well as by advice from Mr Holgate; they did not have any direct knowledge of the evidence that might support the mistreatment allegations; and they did not understand the allegations.

[214] I am unable to accept those contentions. Some of them are contrary to the findings of fact I have made, recorded in the factual narrative. Other contentions are

contrary to the evidence of Mr Swanepoel, including the evidence he gave in the course of extensive cross-examination. For reasons I have also earlier recorded, I prefer the evidence of Mr Swanepoel. These conclusions are not determinative against the plaintiffs on their negligence claim against Mr Swanepoel in respect of the mistreatment allegations, but they go some way to a conclusion that he was not negligent.

[215] What remains to be considered is Mr Swanepoel's evidence of what he did, the advice he gave, the advice he got from Mr Holgate, and the instructions he got from Mr Gillibrand. For this purpose it will be convenient to record some of Mr Swanepoel's evidence, from his brief of evidence, on matters bearing on the ultimate question as to whether, in the circumstances of this case, Mr Swanepoel met the standard of care required of a solicitor when counsel has been instructed. As I have already indicated, but to make clear, I accept Mr Swanepoel's evidence and I do so taking into account the cross-examination of him.

[216] In his brief of evidence (at [158]) Mr Swanepoel referred to his receipt of Gibson Sheat's letter of 11 July 2013 to him and to Mr Holgate which referred, amongst other things, to the Northern Advocate/New Zealand Herald article. Mr Swanepoel then said:

> 159 I had not been aware of the existence of the article until this letter was received and I was very upset to discover that comments had been made to the media regarding a matter before the Court (my secretary had found the article for me on the internet). I was also unhappy with the tone of Andrew's response to Gibson Sheat's email. Furthermore, I was very concerned about the claims made in Gibson Sheat's letter regarding the impropriety of the Mistreatment Allegations and the lack of any evidence in support, and accordingly I raised all these issues with Andrew and advised that I was worried about the approach to the Removal Application.
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> 160 It was around this time that I became aware that Andrew had filed the amended oppositions and changed the approach to the Removal Application. I recall raising a number of serious concerns with him as soon as I became aware that the Mistreatment Allegations had been made. However, I am certain that I was only ever aware that one amended notice of opposition was filed, and although I cannot now determine which of the two was brought to my attention I believe it was the Third Opposition.
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> 162 I deferred to Andrew's proclaimed expertise and his assurances that all necessary steps had been taken to ensure the allegations could be sustained and this correspondence was simply part of the robustness of litigation. Andrew also advised me that the complaints in respect of the Third Opposition were irrelevant in any case as the Removal Application had been overtaken by Bupa's more recent claim against Chris.
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> …
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> 165 I recall telephoning Chris about Gibson Sheat's 11 July 2013 letter. Chris knew what was going on. I went through Gibson Sheat's letter with him. He confirmed he was happy with what Andrew was doing. I asked him whether he was aware of the risks and he confirmed that he was and that Andrew was acting on his instructions. I reiterated that should the Removal Application be successful, which I considered likely, the Estate could be required to pay costs as well as the Estate's liabilities. However, I was reassured by Christ that he was willing to take the risks on the basis of the advice provided by Andrew and the fact that he was confident that there was enough evidence available to support the allegations. I note that Chris was by this stage determined that the Bupa Debt would never be paid by the Estate, insisting that the Trust Debt had been forgiven and that Bupa did not deserve remuneration given their treatment of his father and himself.

[217] Earlier in his brief of evidence, although generally referring to matters later in time than the matters just referred to, Mr Swanepoel had provided the following evidence, which I accept:

> 148 Andrew was emphatic in his insistence to me that the Mistreatment Allegations provided a sustainable defence against Bupa's claim. I remember specifically asking Andrew whether he had the evidence to support this case and he assured me he did. His view as I recall was that the medical notes and Frank Nola's evidence went some way to do so, but he was waiting for some further statements from witnesses Mary stated she was going to obtain and was exploring ways of getting a medical expert. I thought Andrew to be an experienced barrister in this field and accepted his claims that he was somewhat of an expert with significant experience in the medico-legal field. I felt that my distinct lack of knowledge or experience in the medico-legal field meant that I could not argue with the differing theory Andrew had of the case.
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> 149 Given the mandate provided to Andrew by Chris, I was also convinced by Andrew's argument that he was responsible for the conduct of the case and that I was not in a position to go against decisions made between them. I felt myself to be in a difficult position, as I essentially had been told by both Andrew and by Chris not to interfere. However, I was anxious to ensure that Chris was comfortable with making the Mistreatment Allegations, that he was aware of the risks that attached to making such allegations in the event the opposition failed.

> 150 I regularly checked with Andrew that Chris was being advised of the potential problems that could arise from making the Mistreatment Allegations, especially should Bupa be successful in the Removal Application, and received his assurance that Chris was advised of those risks at every meeting. I also recall two occasions when I specifically contacted Chris to check this directly with him.

[218] There are three primary conclusions of fact which satisfy me that Mr Swanepoel did meet the standard of care he owed to the plaintiffs in the circumstances of this case.

[219] The first is that he did maintain the level of review required of a reasonable solicitor with a legal practice such as the one he had.

[220] The second is that, at appropriate times, he sought advice from Mr Holgate and it was not advice which he accepted blindly. In my judgment he was entitled to rely on the advice which I accept he did receive from Mr Holgate.

[221] The third conclusion, and which also bears on the conclusion just noted, is that Mr Swanepoel in any event did not rely solely on the advice and assurances he got from Mr Holgate. Mr Swanepoel sought instructions directly from Mr Gillibrand. I am satisfied that Mr Swanepoel sought to caution Mr Gillibrand in relation to the course of action he had embarked on, with his wife's support, and on the advice of Mr Holgate. In terms of legal principle, the critical point that emerges from this evidence is that Mr Swanepoel was positively instructed to the following effect: the Gillibrands were aware of the risk that they might not succeed in their defence to the removal application or with mistreatment allegations; they were nevertheless confident that, at the least, they had a strong case; they were determined to oppose all of Bupa's claims; they were pleased with Mr Holgate's approach which they fully supported; and they directed Mr Swanepoel to leave matters with them and Mr Holgate.

[222] There are other matters which need to be weighed in the assessment. These include the following: facts which might have indicated to Mr Swanepoel that Mr Holgate was not acting with sufficient objectivity and judgment, indicated most clearly by the letter to Gibson Sheat referring to their client as "blood sucking client" but also including the categorical nature of the allegations in the notices of

opposition; Mr Swanepoel did have some experience with court work, although relatively limited; and, although Mr Holgate been instructed directly on the removal application, Mr Swanepoel, as I earlier found, had continuing responsibilities to the trustees.

[223] Matters of this nature do not persuade me that the plaintiffs have established that Mr Swanepoel breached the duty of care he owed to them. Mr Swanepoel responded appropriately when matters of concern were brought to his attention. The extent of his experience as a litigator was not such as to indicate that he was negligent in relying on the advice he got from Mr Holgate. The fact that Mr Swanepoel continued to be actively involved as solicitor for the trust did not mean that the extent of his obligations as solicitor on the removal application were somehow more than they would have been if he was not acting more generally for the trustees. There was also a question I raised with Mr Swanepoel as to whether there were any indications to him that Mr Holgate was not coping. Mr Swanepoel said that there were no indications to that effect, except at the very end, during the costs hearing. That was at a point where there were no steps Mr Swanepoel might have taken which would have altered the outcome of the removal application and the costs order on it.

[224] There are two further considerations which reinforce my conclusion that Mr Swanepoel was not negligent.

[225] The first is that there was expert evidence for Mr Swanepoel from Christopher Darlow. Two of the three matters on which Mr Darlow's opinion was sought were whether the advice given by Mr Swanepoel would have been given by a reasonably competent solicitor and whether a reasonably competent solicitor with Mr Swanepoel's experience would have relied on the advice Mr Swanepoel said he got from Mr Holgate. Mr Patterson, for the plaintiffs, objected to the admissibility of this evidence. I over-ruled the objection. Mr Darlow has undoubted expertise and experience to give evidence on the matters just noted based on, amongst other things, some 36 years as a partner in an Auckland law firm, and then as a sole practitioner, with an extensive practice which included many years acting as an instructing solicitor briefing counsel and, as Mr Darlow put it, "often in very complex matters".

Mr Darlow was also president of the New Zealand Law Society from 2003 to 2007 during which he was principally involved in the enactment and implementation of the Lawyers and Conveyancers Act 2006. I was satisfied that Mr Darlow's evidence was admissible in terms of the test contained in s 25(1) of the Evidence Act 2006. The essence of Mr Darlow's opinion was that, on the assumption that Mr Swanepoel's evidence of the advice he gave, and the instructions he received, was accepted by the Court, Mr Swanepoel had acted as a reasonably competent solicitor should have acted.

[226] The second consideration arises from an assessment as to what further, or alternative, steps could have been taken by Mr Swanepoel given the fact that Mr Swanepoel, on his own evidence, had concerns about the course of action embarked on by the Gillibrands once he became aware of the introduction of the mistreatment allegations. One possibility, adverted to in the opinion of Kirby J in *Boland v Yates Property Corporation*,[35] might have been advice to the plaintiffs to withdraw the instructions to Mr Holgate and for a new barrister to be retained. That possibility was not viable because of the clear instructions from Mr Gillibrand to Mr Swanepoel not to interfere and that Mr and Mrs Gillibrand not only wished to retain Mr Holgate as counsel but were, in essence, very pleased with the steps he was taking. The other broad option for Mr Swanepoel, given those clear instructions from Mr Gillibrand, would have been to seek to withdraw as solicitor. That step might have been of assistance to Mr Swanepoel in relation to a complaint Bupa made to the New Zealand Law Society.[36] But withdrawing as a solicitor was not a step required to be taken by Mr Swanepoel to meet the duty of care owed to the plaintiffs; in terms of his duty to the plaintiffs it would have been contrary to the instructions they gave. If, by acting on a client's instructions, a lawyer will breach ethical duties, the lawyer is entitled to refuse to act, but that is a quite different point.

[227] Mr Swanepoel said that, with the benefit of hindsight, he wished he had withdrawn as instructing solicitor. He said he did not do so because at the time he believed his principal obligation was to follow his clients' instructions, and to do so

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35 *Boland v Yates Property Corporation Pty Ltd*, above n 27, at [142].

36 A complaint that Mr Swanepoel was a party to making the mistreatment allegations and that in doing so, without evidence, Mr Swanepoel had breached his ethical obligations as a lawyer.

having regard to the separate advice he got from Mr Holgate. In terms of obligations to the client, Mr Swanepoel certainly acted reasonably.

[228] It may be noted, in conclusion, that if Mr Swanepoel had withdrawn when he became aware that the mistreatment allegations were being advanced, it is reasonably unlikely that that would have deterred Mr Gillibrand, with his wife's vigorous support, from maintaining the mistreatment allegations in opposition to the removal application through to the final hearing.

[229] There was a separate basis for the plaintiffs' claims against Mr Swanepoel. This was that Mr Holgate acted as Mr Swanepoel's agent through to the conclusion of the removal application. Mr Holgate did act as Mr Swanepoel's agent for approximately two weeks when Mr Swanepoel was overseas in October-November 2011. Mr Holgate did not act as Mr Swanepoel's agent when he was instructed very soon after Mr Swanepoel returned. The factual foundation for this claim does not exist and it is dismissed.

Conclusion

[230] There was no negligence by Mr Swanepoel in respect of any of the matters alleged by the plaintiffs. The claims against him may be dismissed. With this conclusion I nevertheless note that, if it were to be assumed, contrary to my conclusion, that Mr Swanepoel did breach his duty of care as alleged by the plaintiffs, the amount of the loss caused by that assumed negligence would not have exceeded the amount of the loss caused by Mr Holgate's negligence, as considered in the following sections of this judgment

Evaluation: (3) causation and quantification of loss on the overpayment claim

[231] The primary questions under this heading are whether Mr Holgate's negligence, to the extent that I have found him to be negligent, caused any part of the loss claimed by the plaintiffs in respect of the overpayment claim and, if so, what is the amount recoverable.

[232] Mr Holgate contended that, even if he had been negligent, none of the allegations of negligence against him caused any of the losses to the trust that were claimed by the trust. His argument was, in summary: the trust was always indebted to the estate for $350,000; that liability existed long before Mr Holgate became involved in any way; the estate did not suffer a loss by repaying part of a debt it already owed. Mr Holgate's argument was similar to that for Mr Swanepoel. As Ms Twomey put it for Mr Swanepoel, the trust's net asset position did not change following the payments to the estate.

[233] I am not persuaded that this analysis establishes that Mr Holgate's negligence did not cause loss to the trust. The essential proposition in the argument is correct in accounting terms, but the analysis needs to be made by taking account of other facts which are relevant in law. To the extent that, as a consequence of Mr Holgate's negligence, the trust paid more to the estate than it would otherwise have been required to pay, then the trust has suffered a loss. There had been a debt recorded in the financial statements of the trust which, in accounting terms, reduced the value of the trust's assets recorded in the statements, but to the extent that the debt was never going to be called up, the net value of the assets was in real terms higher than recorded. The evidence establishes clearly that the only demand that was going to be made by the estate on the trust, and the only demand that was in fact made, was for the amount required to meet the liabilities of the estate to third parties. This was the position when Mr Henderson became executor, and which Mr Henderson expressly recognised, as well as the position when Mr Gillibrand was executor.

[234] The task, then, is to identify which elements of the overpayment claim are attributable to the negligence I have found against Mr Holgate. The analysis is to be made by reference to the itemisation of the payments made by the estate recorded in the summary of the overpayment claim.[37]

Interest paid to Bupa and Webb Ross

[235] One element of the overpayment claim is the payments made to Bupa for interest on the resthome fees and to Webb Ross for interest on that firm's legal costs.

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[37] Above at [104].

I have concluded, for the reasons that follow, that the trustees have not established that any of the interest liability was caused by Mr Holgate's negligence.

[236] First, I am not satisfied that Mr and Mrs Gillibrand, as the trustees, were both able and willing to pay any sum to Gordon Gillibrand, or to his estate, until 29 August 2013. This is the date of settlement of the sale by the trustees of part of the farm. This conclusion eliminates almost all of the interest content of the payments to Bupa and Webb Ross.

[237] Further interest was paid on the Bupa resthome fees until December 2013 and on the Webb Ross costs until April 2014. However, the plaintiffs have not established that the additional interest for these two periods would not have been incurred if Mr Holgate had not been negligent. This part of the claim – the interest component – as with other elements of causation and quantification, were generally advanced only in very broad terms for the plaintiffs. It may be assumed, on the plaintiffs' case and my finding of negligence against Mr Holgate, that had there been no negligence in relation to the mistreatment allegations, an independent executor would have been appointed before settlement of the sale of part of the farm at the end of August 2013. On that assumption it might be argued for the plaintiffs that the new executor would then have been in a position to make prompt payment to Bupa for the resthome fees and interest (as opposed to the costs) and to Webb Ross. But there would need to be a further assumption that there were no issues then outstanding in respect of the trust's liability to the estate and the estate's liability to Bupa for the resthome fees and to Webb Ross. Those assumptions cannot be made on the facts as I have found them. I am unable to conclude that appointment of an independent executor earlier than the date on which Mr Henderson was appointed would have led to payment to Bupa and Webb Ross earlier than when they were paid.

Mr Henderson's costs as executor

[238] Another element of the overpayment claim is the sum of just under $23,000 paid to Henderson Reeves for Mr Henderson's costs. In my opinion this is not an expense which is attributable to any negligence of Mr Holgate. The plaintiffs'

contention of relevance in this context is that, had Mr Holgate given the appropriate advice, Mr Henderson, or some other executor in place of Mr Gillibrand, would have been appointed. The only difference on the plaintiffs' contention, compared with what actually occurred, is that the appointment would have happened earlier. But that does not demonstrate that Mr Henderson's costs as executor were a loss to the estate, and therefore to the trust, caused by Mr Holgate's negligence. Costs of a new executor appointed earlier in time would still have been incurred. The plaintiffs have not established that those costs would have been less than the costs actually incurred with Mr Henderson.

Legal costs on Mr Henderson's claim

[239] This is the claimed loss of $1,000. The statement of claim records this as "approximately $1,000 in legal fees incurred in settling" a claim issued by Mr Henderson in March 2014 against Mr and Mrs Gillibrand and John Michael Parker as trustees of the trust. The precise sum appears to have been $1,038. Mr Parker was the third trustee who, as earlier noted, had resigned in November 2013. He had nevertheless been recorded as one of the three trustees in the deed recording the settlement with Bupa. Mr Gillibrand's evidence is that this was a sum paid to Mr Parker's lawyers for reviewing the proceedings. There is no basis upon which Mr Holgate can have liability for this sum.

Bupa's legal costs and disbursements

[240] What remains is that part of the total of $150,000 paid to Bupa in settlement which was for legal costs and disbursements recovered by Bupa in the removal proceeding and in the debt proceeding. As recorded in the factual narrative, on the costs application in the removal proceeding, Heath J made an order that Mr Gillibrand pay Bupa's costs on a 2B basis up to 23 May 2013, being the date of filing of the second notice of opposition, and costs on an indemnity basis from that date. Central to the reasons for the Judge's findings were that, up to Mr Holgate's letter to Gibson Sheat of 15 March 2013 (the letter referring to Bupa as "that blood sucking client of yours"), sensible steps appear to have been taken to resolving the litigation, but this changed, in terms of the pleadings, when the mistreatment allegations were introduced in the second opposition.

[241] Given the reasons for my conclusion that Mr Holgate was negligent in the advice he gave to Mr and Mrs Gillibrand, and in the steps he took, in respect of the mistreatment allegations, I am satisfied that Mr Holgate is liable to the first plaintiffs for the indemnity costs awarded to Bupa, but not for other costs recovered by Bupa either on the removal application or in the Bupa debt proceeding.

[242] The documents put in evidence do not appear to include one with a precise figure for the indemnity costs from 23 May 2013. I am nevertheless satisfied that the appropriate sum can be calculated by deducting from the total settlement payment to Bupa of $150,000 the sums included in that payment for which Mr Holgate is not liable: those are the Bupa resthome fees and interest, costs on a 2B basis on the removal application up to 23 May 2013, and the costs on the Bupa debt proceeding. The figures, rounded up or down to the nearest dollar, are as follows:

Resthome fees	40,191 [38]
Interest on resthome fees to 12/11/13	13,385 [39]
Interest for a further month to settlement at 10% per annum on $40,191	335
	53,911
Bupa costs on a 2B basis to 23/5/13	26,169 [40]
Scale costs on Bupa debt proceeding	5,970
	$86,050

[243] The total from the preceding table of $86,050, deducted from the settlement sum of $150,000, leaves $63,950.

[244] Mr Holgate is liable to the first plaintiffs for that sum of $63,950. This is subject to assessment of his cross-claims, which I will consider after assessing the plaintiffs' claims for wasted costs and general damages.

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38 Document V3A/T5.

39 Ibid.

40 Document V3/T38: schedule "Costs scenario 2" annexed to Bupa memorandum dated 20 September 2013. This includes some costs uplifted by 50%. These have been scaled back to 2B costs.

Evaluation: (4) the plaintiffs' claims for wasted costs and general damages

Wasted costs

[245] There is a claim pleaded as "a sum to be quantified prior to trial in respect of the wasted legal costs in relation to Mr Swanepoel's and Mr Holgate's fees".

[246] This claim cannot succeed against Mr Swanepoel given my conclusion that he did not act negligently in the legal services he provided to the plaintiffs.

[247] As against Mr Holgate, a claim for wasted costs would require consideration if there was adequate evidence, including relevant dates and particulars, of Mr Holgate's invoices for fees, and any expenses, and adequate evidence of payment by the trust. However there is no such evidence. In fact, no sum was quantified even in a general sense before trial, nor was a sum quantified as against Mr Holgate (or Mr Swanepoel) with adequate particulars put in evidence before the plaintiffs closed their case. The only evidence is in Mr Gillibrand's brief of evidence, summarising the payments made at the conclusion of his brief. The summary commences: "The amount we paid out was therefore". One of the items is recorded simply as: "Mr Swanepoel & Mr Holgate $16,939.50".

[248] The Court will usually do its best to make some allowance where there may be an understandable difficulty in providing adequate information, but that does not apply in this instance. There is no reasonable basis for determining how much of that total sum relates to Mr Swanepoel's fees and how much relates to Mr Holgate's fees and then how much of Mr Holgate's fees was for the period before he was negligent in relation to the mistreatment allegations. A broad brush approach, appropriate in some cases, is not appropriate here. For example, on the face of Mr Gillibrand's evidence, this is the total paid over the whole of the period covered by this proceeding, which is effectively from late 2009 to the end of 2013. Mr Swanepoel's costs over that period may have been substantially more than Mr Holgate's. It may be that whatever the portion of the total of $16,939.50 relates to fees charged by Mr Holgate, that portion could be for fees charged for the period before the mistreatment allegations were introduced. That possibility finds some

support in evidence from Mr Swanepoel that payment of fees by Mr and Mrs Gillibrand was on a "drip feed basis".

[249] This is a case where some allowance for wasted costs cannot properly be made, given the onus on the plaintiffs to prove their claim in its material parts. The claim for wasted costs is dismissed.

General damages

[250] The third claim is for general damages of $30,000 each for Mr Gillibrand and Mrs Gillibrand, "as compensation for stress and anxiety".

[251] The claim is against Mr Swanepoel as well as Mr Gillibrand. As with the claim for wasted costs, this claim cannot succeed against Mr Swanepoel.

[252] As a matter of law, general damages could be recoverable by Mr Gillibrand and by Mrs Gillibrand against Mr Holgate for stress and anxiety proved to have been suffered by them as a consequence of Mr Holgate's negligence, and notwithstanding the fact that they sue as trustees of a trust.[41]

[253] The stress and anxiety for which the compensation is sought must, in the first place, be stress and anxiety caused by the breach of duty owed by the defendant. However, a large part of the evidence of both Mr Gillibrand and Mrs Gillibrand relating to stress and anxiety suffered by them was unrelated to the adverse result of the proceedings with Bupa attributable to Mr Holgate's negligence. A reasonably substantial number of the matters referred to by Mr and Mrs Gillibrand as causing stress and anxiety had nothing to do with Mr Holgate (or Mr Swanepoel).

[254] This may be seen in the conclusion to Mr Gillibrand's brief of evidence, under a heading "Effect on me", which followed a summary of the amounts paid in settlement of the proceedings. Mr Gillibrand said:

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[41] *O'Hagan v Body Corporate 189855 [Byron Avenue]* [2010] NZCA 65, [2010] 3 NZLR 445 at [50]-[52].

150. After years of worry about Gordon, these legal difficulties were horrendous. I had relied on my mother and father if I had a problem. Both of those supports for me had gone when Gordon had his stoke in 2003.

151. When the care costs issues became difficult in 2009, I knew I couldn't deal with this on my own so instructed Mr Swanepoel to sort it out. That is how I have dealt with problems throughout my life. If the problem is too much for me, I seek appropriate help. That would often be from my parents in days gone by.

152. Bupa were putting constant pressure on me and I was concerned about keeping my father in Bupa's care.

153. This issue was an enormous worry to me and I was relying on Mr Swanepoel, and later Mr Holgate, to sort it out.

154. In 2012, after the car accident, I needed help even more urgently, instead I only had continued problems. I couldn't deal with everything. I was prescribed antidepressants. I had counselling a couple of times.

155. The extra financial pressure has changed our lives. Our business is barely surviving. The problems started in 2009 and continue now.

[255] There were other matters which either Mr Gillibrand or Mrs Gillibrand, or both of them, acknowledged had caused stress and anxiety, including the following: the financial difficulties from 2009; their concerns that, if they could not pay the Bupa debt, Gordon Gillibrand would be evicted from the resthome; the trust's ongoing dispute with a tenant at the farm; difficulties they faced in selling the farm which they attributed to the tenant's actions; land subsidence and associated damage to their house and a subsequent dispute with the EQC and Vero regarding insurance; their bank's refusal to lend them any money as a result of EQC "writing off" the property and the bank subsequently taking the money paid out by the insurers; the ongoing effects of the car accident in March 2012, including to Mr Gillibrand's mental health as well as the serious injuries suffered by Mrs Gillibrand; a back injury suffered by Mr Gillibrand which required him to go on ACC for eight months in or about 2013; a dispute with their accountant; and the stresses associated with building a new house on the farm property.

[256] In other cases in recent years where sums of around $30,000 have been awarded for general damages, the plaintiffs' evidence of stress and anxiety, or other adverse consequences, has been able to be linked reasonably directly to the

negligence of the defendant and, in addition, those adverse consequences have been assessed as reasonably severe to severe. The evidence of Mr and Mrs Gillibrand, however, is directed to an accumulation of pressures over a lengthy period of time, most of which is not attributable to a legal fault on the part of Mr Holgate. Mr and Mrs Gillibrand have, in addition, sought the sums of $30,000 each in respect of all of the negligence that they alleged against both of the defendants, and most of which has not been established.

[257] Another consideration is that, for reasons already touched on, I am satisfied there were actions by Mr and Mrs Gillibrand related to the mistreatment allegations which contributed to their stress and anxiety, but for which Mr Holgate cannot properly be held responsible in an assessment of general damages. There are two aspects to this. One is that I am satisfied Mr and Mrs Gillibrand did encourage Mr Holgate to think that they would be able to get good evidence to support the mistreatment allegations. The actions of Mr and Mrs Gillibrand do not relieve Mr Holgate of liability for the negligence I have found against him, but it does bear on the assessment of an appropriate sum, if any, to be allowed for general damages. The second point is that I consider it is safe to conclude that Mr and Mrs Gillibrand created stress and anxiety for themselves by the independent steps they took to seek to publicise the mistreatment allegations, with the statement sent to the Campbell Live programme being the most telling instance. In my judgment, from the evidence as a whole, Mr and Mrs Gillibrand had over time, and quite possibly because of the significant financial difficulties they were under for reasons unrelated to the Bupa claim, developed a deep antipathy towards Bupa which was not attributable in any way to anything Mr Holgate did, but which in the end added significantly to their stress.

[258] Taking those considerations into account I am satisfied that, although Mr and Mrs Gillibrand have established that there should be some compensation for stress and anxiety, it can only be a small portion of the amount claimed. The award is in a sum of $5,000 each.

Evaluation: (5) Mr Holgate's cross-claims

[259] This heading is used to refer to Mr Holgate's contributory negligence defence, his counterclaim against Mr and Mrs Gillibrand, and his third party claim against Mr and Mrs Gillibrand. These cross-claims are conveniently dealt with together because, in broad terms, the underpinning of each is the same – a failure by Mr and Mrs Gillibrand to provide evidence in support of the mistreatment allegations.

[260] Mr Holgate contended that there was contributory negligence on the part of Mr and Mrs Gillibrand by failing to provide evidence to prove the forgiveness of the trust debt and failed to provide contact details of witnesses to support the mistreatment allegations. The first aspect, relating to the trust debt, does not require consideration. Because the second aspect is also central to Mr Holgate's counterclaim and third party claim it can be considered as part of the assessment of those claims.

[261] The counterclaim against Mr and Mrs Gillibrand is founded expressly on a contention that there was a contract between Mr Holgate and Mr and Mrs Gillibrand. One term of that contract was said to be an obligation owed by Mr and Mrs Gillibrand to Mr Holgate to provide, or assist in providing, evidence that would provide proof of the mistreatment allegations, either by obtaining the evidence themselves, or by giving Mr Holgate contact details for witnesses. Mr Holgate claimed that Mr and Mrs Gillibrand breached that contractual obligation owed to him and that as a result four things happened: (1) Mr Gillibrand, on the removal application, "was penalised in respect of costs"; (2) the Court was critical of Mr Holgate and Mr Swanepoel for acting without enough evidence; (3) Bupa complained to the New Zealand Law Society "about the case advocated on behalf of the Gillibrands resulting in the censure of Mr Holgate"; and (4) this resulted in material adverse consequences for Mr Holgate personally.[42] There is a claim for damages in a sum of $60,000.

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[42] The adverse consequences pleaded by Mr Holgate are particularised and evidence in support was provided. It is unnecessary to summarise this evidence.

[262] The third party claim was that if, contrary to Mr Holgate's contentions, he was found liable to the trust, then any such liability was attributable to the negligence of Mr and Mrs Gillibrand. The omissions said to constitute the negligence were again a failure to provide, or provide leads to, the evidence which would prove the mistreatment allegations. In his closing submissions Mr Holgate said that, because he was arguing that Mr and Mrs Gillibrand as trustees had not established a claim against him, the third party claim, which was against Mr and Mrs Gillibrand in their personal capacities, was not being "explored further now". It was unclear whether Mr Holgate contemplated that he could explore it further at a later date. He cannot; this claim is to be determined now. In any event, because the substance of this third party claim is essentially the same as that of the counterclaim, and the contributory negligence defence, Mr Holgate's submissions in support of the counterclaim and contributory negligence defence, and relevant evidence, are equally applicable. My conclusions which follow apply to all three claims.

[263] I do not agree with Mr Holgate's contention that Mr and Mrs Gillibrand were under a legal duty to him, in tort or in contract, in respect of the provision of evidence. I accept that, as a matter of fact, Mr and Mrs Gillibrand said that they would take some steps to obtain evidence, or names of witnesses. I also consider it is likely that Mr and Mrs Gillibrand expressed some confidence to Mr Holgate that they would be able to find witnesses to support the allegations. But their failure to achieve what they indicated that they would, or might, be able to achieve did not give rise to any right enforceable by Mr Holgate against them in contract, or in tort, and whether against Mr and Mrs Gillibrand as trustees, or against them in their personal capacities. The simple fact of the matter is that the evidence was not provided. What this gave rise to was not a cause of action available to Mr Holgate against Mr and Mrs Gillibrand, but a duty resting on Mr Holgate, as the lawyer directly responsible for the removal proceeding, and a lawyer owing a duty of care to the trustees, to advise the plaintiffs accordingly, and he did not do so.

[264] There is a separate reason why Mr Holgate's cross-claims cannot succeed. As already discussed, and as also found by Heath J, the mistreatment allegations never provided grounds to oppose the removal application irrespective of the quality

of the evidence said to support those allegations. As I have already held, Mr Holgate was also negligent in that regard.

[265] There is a final consideration. The adverse consequences suffered by Mr Holgate for which he claims damages in contract on the counterclaim would have to have been shown to have been adverse consequences which either followed naturally from the breach said to have occurred, or which were within the reasonable contemplation of the Gillibrands and of Mr Holgate. Neither of those essential elements of the claim in contract were established.

[266] The contributory negligence claim, the counterclaim, and the third party claim, are dismissed.

Costs

[267] All parties requested that questions of costs be reserved pending delivery of the substantive judgment. That is appropriate. There are directions in the results section which follows.

Result

[268] There is judgment for the first plaintiffs against the second defendant for $63,950 for special damages together with interest on that sum pursuant to the Judicature Act 1908 from 17 December 2013 to the date of this judgment.

[269] There is judgment for each of the first plaintiffs against the second defendant for $5,000 for general damages.

[270] All other claims of the first plaintiffs and all claims of the second plaintiff against the second defendant are dismissed.

[271] All claims of the first and second plaintiffs against the first defendant are dismissed.

[272] The second defendant's counterclaim and third party claim are dismissed.

[273] Costs are reserved with the following directions:

(a) Any application for costs is to be made by memorandum to be filed and served by 30 June 2017.

(b) Any submissions in opposition are to be filed and served by 28 July 2017.

(c) Without leave, submissions are not to exceed 10 pages, plus any necessary annexures.

(d) A decision will be made on the papers unless I conclude a hearing is necessary and appropriate.

Woodhouse J