IN THE COURT OF APPEAL OF NEW ZEALAND

CA500/2017
[2018] NZCA 103

BETWEEN	COLIN CHARLES MCKAY, ROGER DAVID CANN AND DAVID JOHN CLARK Appellants
AND	MARK ROBERT SANDMAN Respondent

Hearing:	28 February 2018
Court:	Brown, Brewer and Collins JJ
Counsel:	P J L Hunt and A P Colgan for Appellants R M Dillon for Respondent
Judgment:	20 April 2018 at 10.30 am
Recalled and Reissued:	24 July 2018
Effective date of Judgment:	20 April 2018

JUDGMENT OF THE COURT

A The appeal is allowed.

B Summary judgment is granted to the appellants on the cause of action against them.

C The respondent must pay the appellants costs for a standard appeal on a band A basis and usual disbursements.

D The orders for costs in the High Court are quashed. The respondent must pay the appellants costs and disbursements in the High Court in the amount of $22,939.

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REASONS OF THE COURT

(Given by Brown J)

Introduction

[1] Mrs Sandman's 2005 will provided that her residual estate was to be transferred to her surviving children, Mark (Mr Sandman) and Victoria (Vicky), in equal shares. In December 2010 Mrs Sandman executed a new will which provided that, in the event that either of her children pre-deceased her, the share of her residual estate which that child would have received was to be distributed among various persons instead of to the surviving child.

[2] Vicky died in 2011. Mrs Sandman died in 2013. The appellants are the partners in the law firm, Wilson McKay (the Firm), which obtained probate. Mr McKay and Mr Giboney were appointed executors.

[3] Mr Sandman's proceeding seeks a recall of the probate of the 2010 will, challenging Mrs Sandman's testamentary capacity, claiming that she did not have knowledge of the contents and effects of the 2010 will and alleging undue influence on the part of Vicky and Mr Giboney. He seeks a grant of probate of the 2005 will under which he would inherit the entire residual estate.

[4] The present appeal is solely concerned with Mr Sandman's claim in the same proceeding against the Firm, who were responsible for the drafting and the execution of the 2010 will. Mr Sandman alleges accessory liability on the part of the Firm in dishonestly assisting the alleged conduct of Vicky and Mr Giboney.

[5] The Firm's applications for summary judgment and to strike-out the claim for lack of a cause of action against it were declined by Associate Judge Christiansen.[1] The Firm appeals from the declining of the summary judgment application. The proceeding having commenced prior to 1 March 2017, in view of this Court's decision in *Sutcliffe v Tarr*,[2] the Firm filed in the High Court an application for review of the declining of its strike-out application. That application was then transferred to this Court pursuant to s 64 of the Judicature Act 1908 for hearing concurrently with the appeal.

Relevant background

[6] The Firm's first instruction from Mrs Sandman was in 2007 when she sold her home and moved to an independent apartment in a retirement village. At that time she executed two enduring powers of attorney (EPOA) in favour of Vicky for the purposes of pt IX of the Protection of Personal and Property Rights Act 1988. The EPOA in relation to property was immediately operable while the EPOA in relation to personal care and welfare generally was to become operable if Mrs Sandman became mentally incapable.

[7] In March 2010 Mrs Sandman was assessed as having mild cognitive impairment. Following a fall she was admitted to hospital in July 2010 and Vicky consented to an operation on her behalf. Although her mobility was significantly

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1 *Sandman v Giboney* [2017] NZHC 1832.
2 *Sutcliffe v Tarr* [2017] NZCA 360, [2018] 2 NZLR 92.

affected, on discharge from hospital Mrs Sandman continued to reside in her village apartment with the assistance of caregivers whose wages were paid from Mrs Sandman's bank account operated by Vicky.

[8] Vicky was diagnosed with terminal cancer in 2010. In October that year Mrs Sandman instructed the Firm to prepare a new will making a number of changes to distributions. While Mr Sandman was still to inherit his mother's apartment in Newton, Auckland, if Vicky died before Mrs Sandman then Vicky's share of the residual estate would be distributed to others and not to Mr Sandman.

[9] The 2010 will was executed on 2 December 2010. At the same time Mrs Sandman executed two new EPOAs in favour of Vicky but with Mr Giboney and Mrs Giboney being appointed successor attorneys. Vicky died in March 2011 having disclaimed the EPOAs.

[10] Following Mrs Sandman's death the Firm obtained probate and acted in the administration of the estate with final distributions being made by the end of 2014.

The pleading against the Firm

[11] The statement of claim pleaded three causes of action against the executors, namely lack of testamentary capacity, want of knowledge and approval and undue influence by Vicky and Mr Giboney. It concluded with a single cause of action against the Firm headed "knowing assistance". After repeating all the paragraphs in the three prior causes of action, the claim against the Firm first made an allegation suggestive of conflict of interest:

> 14 At all material times the Second Defendants acted as the lawyers for the deceased and also as the lawyers for Victoria Mary Sandman ("Vicky"), the daughter of the deceased.

[12] Then, after alleging specific involvement and actual knowledge on the part of the Firm by reference to the prior pleading of lack of testamentary capacity, there followed allegations of breaches by the Firm of a duty of confidentiality owed to Mrs Sandman by virtue of the provision to Vicky and Mr Giboney of documents

comprising primarily Mrs Sandman's will instructions, a copy of the 2010 will and of the enduring power of attorney to Vicky.

[13] The pleading then recited the allegation of dishonest assistance in the following terms:

> 23 Throughout 2010 the Second Defendant knowingly assisted Vicky and/or the first named First Defendant obtain control of the affairs of the deceased, and in particular the execution of a will that significantly reduced the benefits otherwise flowing to the Plaintiff, and effected Vicky's own intentions regarding the disposition of the estate of the deceased.

[14] The loss or damage claimed to flow from the Firm's alleged actions was then identified:

> 24 The actions of the Second Defendant in knowingly assisting Vicky and/or the first named First Defendant has caused loss or damage to the Plaintiff, being the difference in disposition to the Plaintiff under the 2005 will (which by Vicky's prior death would have been all of the estate), as opposed to the 2010 will (less than half of the estate).

The High Court judgment

[15] The Firm's applications were advanced on the footing that:

> Knowing assistance (or accessory liability) requires:
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> (i) The existence of a trust (or fiduciary relationship — although there is significant doubt as to whether the doctrine applies where there is not an express trust) to which the defendant is a stranger;
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> (ii) That the plaintiff is a beneficiary of that trust (or fiduciary relationship);
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> (iii) A breach of trust (or fiduciary duty) by a trustee (or the fiduciary);
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> (iv) Knowing and dishonest assistance in the breach of trust (or fiduciary duty) by the defendant.

[16] The Firm contended that those elements were not present at any time during the relevant period in 2010 leading up to Mrs Sandman's execution of the 2010 will. Consequently Mr Sandman's claim against the Firm disclosed no reasonably arguable cause of action and the cause of action against the Firm could not succeed.

[17] While acknowledging the strike-out application, the Associate Judge considered that the case was primarily about summary judgment: whether there was evidence to support the claim or whether it could not succeed.[3]

[18] After a consideration of the parties' contentions concerning the evidence supporting the claim, the Associate Judge reached the following conclusions on the summary judgment claim:

> [94] What this case requires is a careful examination of individual facts. From that it may become easier to define the precise scope of a trust and identify any focus upon the confidence which has been placed in the fiduciary and hence in the areas within which a conflict may lie and a duty arise. It may not be necessary to show that the fiduciary has put personal interest ahead of duty. It may be that a breach can occur when a fiduciary placed them in a position where there is a possibility of a conflict between the fiduciary and the principal. If that person is under a fiduciary obligation they may have to account to the person to whom that obligation was owed and in those circumstances the fiduciary may be considered to be acting as a constructive trustee. It may be that a constructive trust does arise even if there was no lack of good faith nor damage occurred to the person to whom a fiduciary obligation was owed.
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> [95] It is sufficient if the evidence can establish wilfulness and recklessness — a proposition which in this case cannot be ignored at least until all available evidence has been properly assessed.
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> …
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> [98] The Court considers that an allegation of dishonesty could succeed in circumstances where a solicitor has acted carefully to procure procedural oversight in the administration of a change of Will. However, only a proper Court investigation can verify that assumption. This case is about whether sufficient effort was made by Wilson McKay and that should not be a matter for consideration upon the present applications but rather for trial in due course.

[19] The conclusions pertinent to the strike-out application were as follows:

> [99] For his proceeding to be acceptable Mr Sandman needs to provide sufficient pleading details of those acts from which a Court can properly draw a view as to legal consequences. It will be a matter of evidence in due course about whether Wilson McKay held a position of trust to a person it was aware was the subject of significant changes to a Will at a time when the affairs of the testator were being assisted by others who also had knowledge of important medical issues affecting that person.
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> [100] Wilfully shutting one's eyes to the obvious or recklessly failing to make appropriate enquiries could amount to dishonest assistance.

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3 At [85].

> [101] *Schmidt*[4] warns that fraud cannot be left to be inferred from the facts — fraudulent conduct must be distinctly alleged and that general allegations may be insufficient to provide a proper allegation of fraud. In this case it seems to the Court Mr Sandman's pleadings endeavour to identify facts indicating the knowledge of Wilson McKay from which a claim of knowing assistance is identified.

[20] Before proceeding to address the challenges to the judgment, it is convenient first to review the cause of action of dishonest assistance.

Dishonest assistance

[21] In *Royal Brunei Airlines Sdn Bhd v Tan*[5] Lord Nicholls of Birkenhead explained the rationale of the dishonest assistance cause of action (which he referred to as accessory liability)[6] in this way:

> Beneficiaries are entitled to expect that those who become trustees will fulfil their obligations. They are also entitled to expect, and this is only a short step further, that those who become trustees will be permitted to fulfil their obligations without deliberate intervention from third parties. They are entitled to expect that third parties will refrain from intentionally intruding in the trustee-beneficiary relationship and thereby hindering a beneficiary from receiving his entitlement in accordance with the terms of the trust instrument.

[22] The cause of action can conveniently be analysed as having four components:

(i) the existence of a trust or fiduciary duty;

(ii) a breach of that trust or fiduciary duty by a trustee or fiduciary that results in loss;

(iii) participation by a defendant third party (a stranger to the trust) by assisting in the breach of trust or fiduciary duty; and

(iv) dishonesty on the part of the defendant.

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4 *Schmidt v Pepper New Zealand (Custodians) Ltd* [2012] NZCA 565 at [15] and [16].

5 *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 (PC) at 387.

6 He eschewed the use of "knowingly" or unconscionability in the expression of the ingredients of accessory liability: at 392. As to "knowing", similarly see *US International Marketing Ltd v National Bank of New Zealand Ltd* [2004] 1 NZLR 589 (CA) at [4].

[23] Our formulation is essentially similar to that of Rodney Hansen J at first instance in *US International Marketing Ltd v National Bank of New Zealand Ltd*,[7] save that it includes in the second component a reference to the occurrence of loss. Our formulation differs from the tripartite analysis of Duffy J in *Eden Refuge Trust v Hohepa* in that it separates into discrete components the existence of a trust/duty and a breach of that trust/duty.[8]

[24] The formulation proposed by the Firm would include as a further ingredient that the plaintiff must be a beneficiary of the trust or fiduciary relationship,[9] a proposition contested by the respondent. Certainly the plaintiff in a dishonest assistance claim must have a sufficient interest to have standing to bring the claim. However we consider that on the basis of authorities cited by Mr Dillon for the respondent it is arguable that the pool of plaintiffs should not necessarily be confined to direct beneficiaries of a trust in the traditional sense but could extend in the case of a beneficiary-testator to persons who were prospective beneficiaries under the testator's will.[10]

[25] Hence, despite the initial reference to beneficiaries in Lord Nicholls's rationale, given the circumstances of this case we have preferred not to accept the Firm's proposition because the word "beneficiaries" is at least potentially ambiguous in the present context.

[26] Although we heard legal argument directed to several of the components, it is only necessary for the purposes of this judgment to review the principles relating to the issue of dishonesty. The contest between proponents of the objective and subjective approaches to a state of dishonesty was resolved in England by the decision of the Privy Council in *Barlow Clowes International Ltd (in liq) v Eurotrust*

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7 *US International Marketing Ltd v National Bank of New Zealand Ltd* (2002) 7 NZBLC 103,738 (HC) at [33]. Cited in *US International Marketing Ltd v National Bank of New Zealand Ltd,* above n 6, at [36].

8 *Eden Refuge Trust v Hohepa* [2011] 1 NZLR 197 (HC) at [207].

9 See item (ii) quoted in [15] above.

10 *Burgess v Monk* [2016] NZHC 527, [2016] NZAR 438; *Sadler v Public Trust* [2009] NZCA 364, [2009] NZFLR 937; *Re Stewart* [2003] 1 NZLR 809 (HC); and *Simpson v Walker* [2012] NZCA 191, (2012) 28 FRNZ 815.

International Ltd.[11] As Tipping J observed in delivering the judgment of the Supreme Court in *Westpac New Zealand Ltd v MAP & Associates Ltd*:[12]

> [26] In *Barlow Clowes*, which represented a significant volte-face from the decision of the House of Lords in *Twinsectra Ltd v Yardley*, Lord Hoffmann summarised the state of the law on dishonest assistance. The major difference between *Twinsectra* and *Barlow Clowes* is that in the latter case their Lordships recognised, as had Lord Millett in his dissenting speech in *Twinsectra*, that although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant's mental state would be described as dishonest, it is irrelevant that the defendant has different standards and does not appreciate that his conduct, by ordinary standards, would be regarded as dishonest. We would adopt his Lordship's summary in *Barlow Clowes* but with some elaboration as regards when suspicion amounts to dishonesty. In that respect the Privy Council said that the necessary state of mind could consist in suspicion combined with a conscious decision not to make inquiries which might result in knowledge.
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> [27] The key ingredient in the cause of action for dishonest assistance is the need for a dishonest state of mind on the part of the person who assists in the breach of trust. We agree with the statement in *Barlow Clowes* that such a state of mind may consist in actual knowledge that the transaction is one in which the assistor cannot honestly participate. But it may also consist in what we would describe as a sufficiently strong suspicion of a breach of trust, coupled with a deliberate decision not to make inquiry least the inquiry result in actual knowledge. For the purpose of this alternative, it is necessary that the strength of the suspicion that a breach of trust is intended makes it dishonest to decide not to make inquiry. That state of mind, which equity equates with actual knowledge, is usually referred to as wilful blindness. It involves shutting one's eyes to the obvious and can thus fairly be equated with the dishonesty involved when there is actual knowledge.

[27] The New Zealand approach was conveniently summarised in this Court's decision in *Fletcher v Eden Refuge Trust*:[13]

> In New Zealand a dishonest state of mind is determined by the application of an objective standard. A dishonest state of mind consists of actual knowledge that the transaction is one in which the assistor cannot honestly participate or a sufficiently strong suspicion of a breach of trust that it is dishonest to decide not to inquire, coupled with a deliberate decision not to make inquiry lest the inquiry result in actual knowledge.

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11 *Barlow Clowes International Ltd (in liq) v Eurotrust International Ltd* [2005] UKPC 37, [2006] 1 WLR 1476.

12 *Westpac New Zealand Ltd v MAP & Associates Ltd* [2011] NZSC 89, [2011] 3 NZLR 751 (footnotes omitted).

13 *Fletcher v Eden Refuge Trust* [2012] NZCA 124, [2012] 2 NZLR 227 at [67].

Summary judgment appeal

[28] As did the Associate Judge and the parties' submissions, we focus first on the summary judgment appeal.

Approach on appeal

[29] Summary judgment may be given against a plaintiff if the defendant establishes on the balance of probabilities that none of the causes of action against it in the statement of claim can succeed.[14] The onus of proof is on the defendant. Judgment is likely to be given in favour of a defendant where it offers evidence that is a complete defence to the claim against it.[15]

[30] While summary judgment is inappropriate where there are factual disputes or where the court must determine material facts independently of affidavit evidence, the court may disregard factual disputes which are plainly spurious or contrived. When considering a summary judgment application, this Court has recognised that the need for judicial caution has to be balanced with the appropriateness of a robust and realistic judicial attitude when that is called for by the particular facts of the case.[16]

[31] An appeal against a refusal to grant summary judgment is by way of rehearing.[17] An appellant is entitled to judgment in accordance with the opinion of the appellate court.[18] The appellate court should not defer to the lower court's assessment of acceptability and weight to be accorded to the evidence rather than forming its own opinion.

Evidence

[32] In support of the application the Firm filed affidavits of Mr D J Clark, a partner in the Firm, and Ms J M Paul who was a senior associate at the Firm in the relevant period.

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14 High Court Rules, r 12.2(2).
15 *Jones v Attorney-General* [2003] UKPC 48, [2004] 1 NZLR 433 at [5].
16 *Bilbie Dymock Corporation Ltd v Patel* (1987) 1 PRNZ 84 (CA) at 86.
17 Court of Appeal (Civil) Rules 2005, r 47.
18 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [16].

[33] Mr Sandman filed two affidavits in opposition. The first was a brief document which simply referred to Mrs Sandman's two wills and contended that the Firm owed fiduciary duties to Mrs Sandman which had been breached causing harm to Mr Sandman.

[34] However the second affidavit annexed affidavits of Mr Sandman filed in a Family Court proceeding against Mr and Mrs Giboney,[19] together with affidavits of five other persons filed in that proceeding as well as various memoranda, notices, minutes and correspondence relating to that. Although by a memorandum dated 7 June 2017 the Firm had objected to the admissibility of the affidavits of the other five persons, it does not appear that the Associate Judge made a ruling on the point. Indeed he refers to a number of those affidavits in the course of his review of Mr Sandman's evidence.

[35] In the course of his submissions Mr Hunt for the appellants renewed the objection to the admissibility of the affidavits of the five other persons. We agree that that evidence is hearsay. While we take into account the two affidavits of Mr Sandman in the Family Court proceeding, we are not persuaded that the affidavits of other persons in another proceeding should be admitted under s 18 of the Evidence Act 2006.

[36] An affidavit of Mr Clark was filed in reply confined to the issue of security for costs.

[37] The Firm's argument challenged each of the four components of the dishonest assistance cause of action,[20] albeit its argument on the first component (the existence of a trust or fiduciary duty) incorporated the contention that it was a prerequisite that Mr Sandman must be a beneficiary of the trust/duty.[21]

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19 Under the Protection of Personal and Property Rights Act 1988.
20 At [22] above.
21 See item (ii) quoted in [15] above.

First component: a trust or fiduciary duty

[38] Mr Sandman's claim was clouded by allegations of breaches of duties owed directly by the Firm to Mrs Sandman. A good example is the contention in Mr Sandman's first affidavit in opposition that the Firm owed fiduciary duties to Mrs Sandman which they breached causing harm to Mr Sandman, being a person in contemplation as likely to suffer harm as a beneficiary under the 2005 Will.

[39] Once those confusing allegations of directly-owed duties were put to one side, it was apparent that Mr Sandman's claim was that — as the holders of EPOAs from Mrs Sandman — Vicky and, in due course Mr Giboney, owed fiduciary duties to Mrs Sandman in any exercise of such power. As Mr Dillon's written submission for the respondent expressed it, the relevant right was regarding the administration of the deceased's affairs while still alive, to be properly administered under the power of attorney or agency law.

[40] The Firm properly acknowledged that Vicky would have owed fiduciary duties to Mrs Sandman in any exercise of the EPOAs. In *Vernon v Public Trust* this Court ruled that the nature of an EPOA as a statutory creature[22] did not exclude the imposition of equitable obligations on the holder of the EPOA:[23]

> To the contrary, equity imposes enforceable duties upon an agent to ensure that he or she discharges a power for the purpose for which it is granted. Fiduciary obligations are a necessary incident of the relationship of principal and agent. Unless the instrument or statute requires otherwise, the agent must discharge his or her duties towards the principal with the utmost loyalty, honesty and good faith. He or she must ensure that he or she does not benefit himself or herself at the donor's expense. And he or she must act always in the donor's best interests, in particular where a power is granted for the purpose of preserving and managing the donor's property.

[41] However the Firm submitted that, while an EPOA involves authority to deal with the donor's property as the donor's agent, it does not give rise to a trust, constructive or otherwise. It submitted that the legal nature of the relationship between agent and principal is distinct from that of the relationship between trustee and beneficiary. Consequently a fiduciary relationship that does not involve dealing with trust property is not capable of founding a dishonest assistance cause of action.

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22 Protection of Personal and Property Rights Act, pt 9, ss 93A–108AAB.

23 *Vernon v Public Trust* [2016] NZCA 388, [2016] NZAR 1375 at [37] (footnotes omitted).

[42] If, as we infer, the Firm's reference to trust property is a narrower concept than the donor's property the subject of the EPOA, then we do not accept the Firm's contention. In our view a breach by an EPOA holder of the fiduciary duty owed to the donor in the course of the exercise of the power that results in a loss would suffice to satisfy the first and second components of the dishonest assistance cause of action.

Second component: breach of fiduciary duty

[43] The evidence filed by the Firm in support of the application for summary judgment comprised the affidavits of Mr Clark and Ms Paul.[24] The former affidavit was primarily directed to the propositions first that neither Vicky nor Mr Giboney was a trustee of a trust of which Mr Sandman was a beneficiary and second that neither owed a fiduciary duty to Mr Sandman in respect of Mrs Sandman's property or affairs.

[44] The only statement of Mr Clark remotely relevant to the second component of the cause of action was an expression of opinion that neither Vicky nor Mr Giboney obtained control of Mrs Sandman's affairs during 2010. Ms Paul's evidence went a little further, observing that she did not see any evidence that Vicky had attempted to influence Mrs Sandman to change her will or have any say in the distribution to other friends and family.

[45] However this evidence is not of the nature or strength to cause a court to be satisfied that Mr Sandman could not prove to the civil standard that there had been some breach of fiduciary duty by either Vicky or Mr Giboney. On this point the Firm has not discharged the burden of proof in r 12.2(2).

[46] The Firm further contended that, even if Vicky had exercised undue influence over Mrs Sandman to orchestrate the execution of a will that did not reflect her true intentions for her estate, such conduct did not constitute an exercise of any power under the EPOA. It submitted that wrongdoing by the EPOA holder will only involve a breach of fiduciary duty where it occurs in the course of the exercise of the

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24 See [32] above.

power. It emphasised that Mrs Sandman executed the 2010 will herself and that there could be no suggestion that the will came about through some dealing or transaction by Vicky acting as Mrs Sandman's attorney.

[47] We accept that the mere fact that a person is a fiduciary does not automatically render wrongdoing a breach of the fiduciary duty owed. However while at trial it may be shown to be the case that, if there were actions on the part of Vicky or Mr Giboney that were wrongful, such actions were not within the scope of the exercise of the EPOAs, on the state of the evidence at this juncture the Firm has not satisfied us that Mr Sandman could not establish the second component of the cause of action.

Third and fourth components: dishonest assistance

[48] While denying that there had been any relevant breach of fiduciary duty, the Firm realistically accepted that in a summary judgment context, assuming there was a breach of duty, then it had a high hurdle to jump in order to satisfy us that there had been no assistance by the Firm.

[49] However the Firm vigorously rejected the proposition that any assistance it may have inadvertently provided was dishonest in the sense defined by the authorities referred to above.[25] It was to this issue that Ms Paul's affidavit was primarily directed.

Ms Paul's evidence

[50] Ms Paul was employed as a senior associate at the Firm from 1997 to 2014. It was she who in 2007 received Mrs Sandman's instructions concerning the sale of her home and the purchase of an occupation licence in a retirement village. Ms Paul also prepared and assisted in the execution of the two EPOAs which were a requirement of the occupation licence.

[51] In February 2010 Ms Paul visited Mrs Sandman at the retirement village to discuss concerns Mrs Sandman had regarding her affairs, in particular her concern

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[25] At [26] and [27].

that Vicky was being treated unfairly in the 2005 will because Mr Sandman had been living rent free in Mrs Sandman's Newton apartment for many years and receiving a weekly allowance. Vicky, who was present at the meeting at Mrs Sandman's request, did not want Mrs Sandman to change her will. The 2005 will was not changed at that time.

[52] After Mrs Sandman's discharge from hospital to the retirement village care unit in mid-2010 Ms Paul wrote to Mrs Sandman (care of Vicky, as Mrs Sandman was in the care unit) with reference to Mrs Sandman's anxiety that the village had concerns about her physical health and ability to cope in an independent apartment. Notwithstanding that Mrs Sandman's mobility had been significantly affected, she wished to remain in her apartment. Arrangements satisfactory to the village were made for a caregiver to assist Mrs Sandman. Ms Paul explained her understanding that the village's concerns were only in relation to Mrs Sandman's physical health. She stated that she did not believe the village would have consented to Mrs Sandman remaining in her independent apartment if the village had concerns about her mental health.

[53] Ms Paul visited Mrs Sandman in her apartment on 19 October 2010 in order to take instructions for a new will. Vicky was present at Mrs Sandman's request. Mrs Sandman explained the nature of the changes she wished to make. Ms Paul's evidence about this meeting is discussed in detail below.[26] It was at this meeting that Vicky informed Ms Paul of her cancer diagnosis.

[54] Ms Paul advised Mrs Sandman that her reasons for changing her 2005 will should be recorded in writing and that she would draft a document for her to sign which explained why she was leaving Vicky's share to other family instead of Mr Sandman. Although this could have been written in the will, Ms Paul suggested a separate document because a will would become a public document when probate was granted. Mrs Sandman agreed with this suggestion.

[55] Ms Paul explained that, while Mrs Sandman had some hearing issues and consequently Ms Paul had to speak up, she was satisfied that Mrs Sandman had

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[26] At [87] and [88].

testamentary capacity and understood that she was making a new will as well as what the main change from the 2005 will would be. Ms Paul did not see any evidence that Vicky was attempting to influence her mother to change her 2005 will or to have any say in distribution to other friends and family. Ms Paul stated that Vicky's only influence during the meeting was telling her mother that she would not want to be compensated for Mr Sandman receiving the Newton apartment.

[56] Initially Mrs Sandman had instructed Ms Paul to send the draft will care of Vicky. However Vicky advised that she was having treatment so Mrs Sandman requested that Ms Paul should write care of Mr Giboney instead. Mrs Sandman explained that she did not want the draft will to be sent to her directly in case Mr Sandman collected the mail or saw the draft around her apartment.

[57] Following the meeting Ms Paul wrote to Mrs Sandman on 21 October 2010, care of Mr Giboney as requested, summarising the instructions received and what further information was still required before a new will could be drawn up. Although Ms Paul was confident that Mrs Sandman had testamentary capacity, she suggested in the letter that it would be prudent in the circumstances to obtain a certificate from her doctor to confirm this.

[58] On 27 October 2010 Ms Paul requested Mrs Sandman's doctor of eight years to provide a medical certificate to confirm that Mrs Sandman had the mental capacity to understand that she was making a will and disposing of her assets. Although the doctor did not visit Mrs Sandman, she provided her opinion based on a previous visit on 30 September 2010 that Mrs Sandman did have the required mental capacity.

[59] Ms Paul received further instructions as to disposition of property from Mrs Sandman via Mr Giboney, as Mrs Sandman suffered hearing loss and found long telephone conversations difficult. Ms Paul wrote to Mrs Sandman on 15 November 2010 enclosing a draft will. Given Vicky's state of health, Ms Paul also advised that it would be prudent for arrangements to be made for successor powers of attorney. Consequently Mrs Sandman instructed Ms Paul that she wished

to appoint Mr Giboney as successor attorney for property and Mr Giboney's wife as successor attorney for personal care and welfare.

[60] Once the details had been finalised Ms Paul arranged to attend on Mrs Sandman on 2 December 2010. Given that the Firm had acted for Vicky in respect of other matters, Ms Paul arranged for Mrs Sandman to obtain independent legal advice from Mr Mellett of Quay Law before executing the new 2010 EPOAs.

[61] Because of her concern that the reasons for the change in the will should be recorded in writing by Mrs Sandman, as previously agreed Ms Paul prepared a statutory declaration for Mrs Sandman to execute in the following terms:

> I, **Elizabeth Nancy Sandman** of Auckland, Retired, solemnly and sincerely declare:
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> 1 My Will to be signed the same date as this declaration. I have been advised by my Solicitors, Wilson McKay that by leaving fifty (50) per cent of the residue of my estate to relatives (my sister, nieces, nephews) and to friends in the event my daughter **Victoria Sandman** predeceases me rather than leaving the whole of my estate to my son **Mark Sandman**, my son Mark may consider bringing an action under the Family Protection Act 1955 to upset the provisions of my Will.
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> 2 I have considered my assets and my own financial position and taken into account that I have supported **Mark** for the last twenty (20) years by providing him with a rent free accommodation, giving him a weekly allowance and paying all out of pocket expenses including medical and dental expenses, while he has attempted to establish himself as an artist. Prior to this date Mark has also been given extensive financial support from me and my late husband, that was not given to his sister **Victoria**. I have left **Mark** my Auckland apartment currently occupied by him rent free together with fifty (50) per cent of the residue of my estate and taking into account all of **Marks** circumstances I believe that the terms of my Will I have signed together are fair and proper taking all these factors into account.
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> 3 I request that my family respect my wishes and abide by the terms of my Will.

[62] Ms Paul explained the events relating to execution of the 2010 will in this way:

> 31 I attended Mrs Sandman at her apartment on 2 December 2010. Her caregiver, Vicky and Mr Giboney were present (Vicky and Mr Giboney had to sign the powers of attorney). We had morning

> tea. I then met Mr Mellett at reception and took him and introduced him to Mrs Sandman.
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> 32 We left Mr Mellett and Mrs Sandman in the apartment, so that he could provide her with independent advice. When he had finished we all came back and Mrs Sandman, Vicky and Mr Giboney signed the new powers of attorney for property … and personal care and welfare … Each of these were accompanied by a certificate from Mr Mellett stating that the requisite independent legal advice had been given and that he had no reason to suspect that Mrs Sandman was mentally incapable at the time.
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> 33 Mr Giboney then left and I read through the will and statutory declaration with Mrs Sandman. I explained each clause and asked her to confirm that the will was correct, saying that if it was not I could have it changed and come back. Mrs Sandman confirmed that it was fine. Mrs Sandman then executed her new will …, witnessed by the caregiver and myself … and the statutory declaration regarding her intentions under the 2010 will … then left with the signed documents.

[63] Vicky's health continued to deteriorate and by late November she was no longer well enough to assist with Mrs Sandman's affairs. On Vicky's instructions Ms Paul drafted a disclaimer of both EPOAs she held for Mrs Sandman which was executed on 25 February 2011.

[64] Sometime after Vicky's death in 2011 Ms Paul received a call from one of Mrs Sandman's carers asking her to visit to discuss Mrs Sandman's will. Ms Paul visited Mrs Sandman in November 2011. She took with her copies of the 2010 will and the 2010 EPOAs and discussed them with her. After that consultation Mrs Sandman advised that she did not wish to change her 2010 will. It was Ms Paul's perception at that time that Mrs Sandman appeared to have a good understanding of the 2010 will and how her estate would be distributed.

[65] Neither of Mr Sandman's two affidavits in opposition directly engaged with the evidence of Ms Paul concerning the Firm's conduct. However it is apparent from the two affidavits that he filed in the Family Court proceeding and the medical documentation pertaining to Mrs Sandman annexed to the second of those affidavits that Mr Sandman did not consider that his mother had testamentary capacity at the time of execution of the 2010 will.

Discussion

[66] Has the Firm satisfied us that Mr Sandman could not establish that by reference to an objective standard the Firm had a dishonest state of mind of the nature explained in *Westpac New Zealand Ltd v MAP & Associates Ltd*,[27] as summarised in *Fletcher v Eden Refuge Trust*?[28]

[67] In effect, to succeed the Firm must satisfy us that it did act honestly when viewed objectively. The question is specific to the circumstances. As Lord Nicholls stated in *Royal Brunei Airlines Sdn Bhd v Tan*:[29]

> [W]hen called upon to decide whether a person was acting honestly, the Court will look at all the circumstances known to the third party at the time. The Court will also have regard to personal attributes of the third party, such as his experience and intelligence, and the reason why he acted as he did.

[68] We first consider the dishonesty allegation as pleaded. We then proceed to address the contention as it was developed in the course of submissions.

The pleaded case

[69] The allegation of dishonest assistance in the statement of claim[30] does not include any specific particulars of dishonesty on the Firm's part. We agree with the Firm's submission that the pleading should have been specific in that respect. Nevertheless we consider that there are a number of allegations in the pleading of the "knowing assistance" claim which Mr Sandman may have included with an eye to the dishonesty component.

[70] First there is the allegation earlier noted that at all material times the Firm acted as lawyers both for Mrs Sandman and for Vicky.[31] We do not consider that the fact the Firm acted for both testator and beneficiary and for both donor and holder of the EPOAs of itself is indicative of dishonesty. In any event there was no change to Mrs Sandman's will until December 2010. Further, as Ms Paul explained the Firm

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27 *Westpac New Zealand Ltd v MAP & Associates Ltd*, above n 12, at [27].
28 *Fletcher v Eden Refuge Trust*, above n 13.
29 *Royal Brunei Airlines Sdn Bhd v Tan*, above n 5, at 391.
30 See [13] above.
31 At [11] above.

took steps to arrange for Mrs Sandman to receive independent advice before executing the 2010 EPOAs.[32]

[71] Secondly there are the allegations of breaches by the Firm of a duty of confidence owed to Mrs Sandman.[33] Even if the fact of such a duty of confidence was material to the dishonesty analysis, on the evidence there was no breach of that confidence obligation by the Firm in providing to Vicky and to Mr Giboney the documents referred to in the statement of claim. That mode of communication was adopted for practical reasons with Mrs Sandman's knowledge and consent.

[72] A third allegation in the cause of action against the Firm that may have been intended to address the issue of dishonesty is the following cross-reference to the lack of testamentary capacity cause of action against the executors:

> 16. Between March 2007 and December 2010 the Second Defendants acted in relation to the deceased as set forth in paragraph 5 hereof, and with specific involvement and actual knowledge particularised in sub-paragraphs (a), (b), (g), (h), (l), (m), (n), (o), and (q).

[73] The relevant parts of para 5 state:

> 5 The 2010 will was executed by the deceased when she lacked testamentary capacity. The lack of capacity is evidenced by:
>
> (a) On the 18th March 2007 the deceased granted Vicky an enduring power of attorney, that was not limited to when she may become incapacitated ("the 2007 EPOA").
>
> (b) On 21 January 2010 Julie Paul, a senior associate of the Second Defendants, certified a true copy of the 2007 EPOA. The certified true copy of the 2007 EPOA was then presented to the ASB Bank Ltd to enable Vicky to take control of the accounts of the deceased from January 2010.
>
> …
>
> (g) In August 2010 Vicky was diagnosed as suffering a brain tumour and advised she had approximately 6 months left to live.
>
> (h) On 1 September 2010 the Second Defendants through their employee Julie Paul (nominally) wrote to the deceased care of Vicky advising (in effect) Vicky of the indication by the rest

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32 At [60]–[62] above.
33 See [12] above.

home to terminate the occupation licence of the deceased due to her deteriorated mental health. The letter of 1 September refers to a telephone conversation on 31 August 2010. On the same date an invoice (bearing dated 31 August) was rendered nominally to the deceased but again care of Vicky, for that advice.

…

(l) On 27 September 2010 Vicky provided the first named First Defendant with her own Enduring Power of Attorney (Vicky's EPOA). Vicky's EPOA was preferred by, witnessed, and certified by Julie Paul.

(m) On 21 October 2010 the Second Defendants by their employee Julie Paul wrote (nominally) to the deceased, care of the first named First Defendant, and copied to Vicky, setting out the terms of a proposed new will, and of a new Enduring Power of Attorney (in favour of Vicky but with the first named First Defendant as substitutionary Attorney), noting that giving the power to Vicky was to be reviewed in November ("the will instructions letter"). The will instructions letter notes: (a) that the first named First Respondent will receive a bequest of $10,000 in consideration of his attendances as executor of the deceased's estate, and (b) that the Second Defendants will arrange for Dr Buckley to visit the deceased to provide the Second Defendants with a medical certificate confirming the deceased has capacity to make a will.

(n) Contrary to the will instructions letter, the Second Defendants obtained a certificate from Dr Buckley dated 28 October 2010, recording that when Dr Buckley last saw the deceased on 30 September 2010, it was the opinion of Dr Buckley that the deceased on that dated (30 September 2010) had capacity to execute a will.

(o) On 2 December 2010 Julie Paul attended on the deceased, and witnessed the deceased execution of the 2010 will. She also witnessed a statutory declaration by the deceased of the reasons for her changes in the 2010 will. The statutory declaration was prepared in advance by the Second Defendants and executed together with the 2010 will.

…

(q) On 3 December the Second Defendant wrote (nominally) to the deceased but sent care of Vicky, copies of the 2010 will and the new Enduring Power of Attorney. An invoice for those services was issued same day, but addressed to the residential address of the deceased.

[74] Subparagraphs (b) and (l) appear to be directed to the conflict of interest proposition while subparas (h) and (q) contain allegations similar to those discussed

in the context of the alleged breaches of a duty of confidentiality. There is nothing in these allegations that advances Mr Sandman's position beyond those already addressed above.

[75] Subparagraphs (m) and (n) concern the will instructions letter and the doctor's certificate opining on Mrs Sandman's capacity to make a will. In fact this allegation is expressly made in the cause of action against the Firm:

> 18 Contrary to the will instructions letter, the Second Defendants failed to obtain medical evidence of the testamentary capacity of the deceased as at the time of execution of the will, regarding the testamentary capacity of the deceased.

[76] Ideally the doctor might have attended upon Mrs Sandman closer to the date of execution of the will than the prior visit of 30 September 2010 which was the basis for the medical certificate of 27 October 2010. However no adverse inference as to Ms Paul's motivations could fairly be drawn from the time gap. It was Ms Paul herself who suggested that it would be prudent to obtain a doctor's certificate.

[77] Furthermore given Ms Paul's own observations at the date of execution and her knowledge that Mr Mellett was also of the view that there was no reason to suspect that Mrs Sandman was mentally incapable, there appears to be no basis for doubting the bona fides of Ms Paul's assessment that Mrs Sandman had not suffered a loss of testamentary capacity in the period since 30 September 2010.

Mr Sandman's argument

[78] We turn from the pleadings to the respondent's submissions. The most comprehensive encapsulation of Mr Sandman's complaint was contained in the following written submission:[34]

> The Plaintiff believes that the facts are central to the case. An elderly infirm woman, an existing will, an existing power of attorney, a recent medical history of dementia, a daughter acting under the power of attorney, other people acting on behalf of the elderly woman, the acknowledged need for medical advice as to capacity, a lack of proximate and relevant medical assessment, reporting to third parties (and interested third parties), taking instructions in the presence of third parties, concern to ensure other family

[34] Precisely the same submission was advanced in the High Court: *Sandman v Giboney*, above n 1, at [71].

> members do not discover what is happening, admitting the frailty and lack of insight in a written report a year later, and then falsely reporting to that other family member after the death of the elderly woman. The lack of contemporaneous notes of instructions in this case is notable. Also notable are the failures to make the enquiries expected in relation to capacity at the time the will was executed given that the issue was raised and the need to do so specifically noted.

[79] In our consideration of the pleadings we have already addressed some of the factors in that analysis: the proximity of the medical assessment to the date of execution of the 2010 will, and the Firm's mode of reporting to Mrs Sandman via Vicky or Mr Giboney.

[80] As for other aspects of that analysis, we do not attribute significance to the fact that Ms Paul took instructions from Mrs Sandman concerning her will in the presence of Vicky. Notwithstanding that Vicky was a beneficiary, it is entirely understandable that a woman of Mrs Sandman's advanced years would wish to have her daughter present at a meeting with her legal adviser. There is no suggestion that Mrs Sandman had a contrary wish. Indeed Ms Paul stated that at both the February 2010 meeting[35] and the 19 October 2010 meeting[36] Vicky was present at Mrs Sandman's request.

[81] Furthermore, given Vicky's diagnosis, the execution of replacement EPOAs that provided for successor attorneys was entirely logical. So too was the retention of Vicky as a holder of the EPOAs given the decision that was taken, according to Mr Sandman, to keep secret from Mrs Sandman, at least initially, the fact of Vicky's diagnosis. The fact that Mrs Sandman preferred not to disclose to Mr Sandman the nature of the changes she intended making to her will is not a factor warranting the attribution to the Firm of a dishonest motivation.

[82] The reference to a written report one year later appears to be to a letter from Ms Paul to Mr Giboney dated 1 December 2011 reporting on Ms Paul's visit to Mrs Sandman in November 2011.[37] In that letter Ms Paul advised that Mrs Sandman wished to have some involvement in her financial affairs and had requested a

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35 See [51] above.
36 See [53] above.
37 See [64] above.

monthly copy of her bank statement and a summary of her investments in the event that they changed. Ms Paul recorded that Mrs Sandman appreciated that she was not in a position to actually manage her affairs but simply wished to have a regular update. Ms Paul concluded her report by stating:

> In summary considering Liz's recent bereavement she seemed in reasonable spirits and was clearly being well cared for. Mentally she seemed a lot more alert than previously, however this may be down to her hearing aid.

[83] We do not consider that the letter constitutes an admission of frailty or lack of insight on Mrs Sandman's part. Certainly nothing in the letter is indicative of any dishonest motivation on the Firm's part.

[84] The summary of Mr Sandman's complaint also included reference to a false report presumably to Mr Sandman after his mother's death on 30 October 2013. There is nothing in the record before us that corresponds with that description.

[85] Individually none of these several points of complaint provides a basis for the inference that, in the actions taken to prepare and arrange for the execution of Mrs Sandman's 2010 will, Ms Paul or any other member of the Firm acted in a manner different from the way an honest solicitor would act when attending to such matters. Nor when viewed cumulatively do they support such a conclusion.

[86] However when in the course of argument we pressed Mr Dillon on the issue of evidence supportive of the dishonesty allegation, he suggested that the evidence pointed to a web of relationships between the various parties. Consistent with Mr Sandman's view, he contended that the Firm had acted for Mrs Sandman at a time when it was clear that she lacked testamentary capacity. Indeed he went so far as to submit that the Firm dishonestly assisted Vicky to prepare a will which the Firm knew to be contrary to Mrs Sandman's intentions.

[87] In support of that contention Mr Dillon pointed to a passage in Ms Paul's affidavit that suggested that Mrs Sandman's wishes were different from the directions in her 2010 will and as explained in her statutory declaration. In paragraph 18 Ms Paul had stated that Mrs Sandman had said that she wanted her sister and others to have a share if "both children" did not survive her.

[88] However it is perfectly plain from reading the passage in context that the reference to "both children" was a misstatement. Paragraphs both preceding and following that statement made it clear that Mrs Sandman's instructions were as recorded in her contemporaneous statutory declaration:

> 17 Mrs Sandman was aware she had shares, bonds and bank deposits and said these were to be split between Vicki and Mark equally as per the 2005 will. She then said that if either Vicki or Mark died before her, as she had no grandchildren she wanted their share to be split between family and friends. She named her sister, nieces and brother in law but was undecided on what proportions to allocate. I suggested she think about it and let me know and what share each would get.
>
> 18 I recall that Mrs Sandman commented several times during the meeting that Mark would only spend everything he inherited, and that she wanted her sister and others to have a share if both children not survive her. She also said she and her late husband had supported Mark for years and comments such as *"he has had a lot of money and he just wastes money"*. I told Mrs Sandman that I thought this should be recorded in writing and I would draft a document for her to sign explaining why she was leaving Vicky's share to other family instead of Mark. This could have been written in the will, however I suggested a separate document because a will becomes a public document when probate is granted. She agreed with this.
>
> 19 While Mrs Sandman was upset about the reason she was changing her will, she was clear in her instructions. She understood clearly that she was making a new will and the extent of her estate. She was clear that Mark would inherit a freehold apartment and a substantial amount of money, which would be the same regardless of whether Vicky outlived her. She was clear that she wanted other family and friends to benefit in the event that she did not.

[89] There was no other evidence which in our view provided any basis for the allegation of dishonest assistance by the preparation of a will in the knowledge that it was contrary to the testator's intentions. Indeed the precaution which Ms Paul took in suggesting and arranging for a statutory declaration explaining Mrs Sandman's reasons for making the changes is entirely at odds with such a dishonest motivation.

[90] In our view this grave allegation was not only unsubstantiated but was comprehensively rebutted by Ms Paul's detailed affidavit.

[91] Mr Dillon naturally emphasised that Ms Paul had not been cross-examined and hence her evidence had not been tested. However the issue is whether the

Firm's conduct through the agency of Ms Paul was honest when measured by an objective standard. In our view all the points of criticism have been aired and satisfactorily answered. Viewed realistically the allegation of dishonesty is without merit.

Conclusion

[92] We are satisfied on the basis of Ms Paul's evidence that, in the circumstances known to her at the material time, she acted as an honest legal adviser would have acted in the provision of advice to Mrs Sandman and in the steps taken to give effect to Mrs Sandman's testamentary wishes. Consequently we are satisfied that Mr Sandman could not establish at trial that the Firm's actions, assuming that they somehow amounted to assistance in a breach of a fiduciary duty owed by others to Mrs Sandman, were undertaken dishonestly.

[93] Given that conclusion, the Firm is entitled to an order for summary judgment on Mr Sandman's claim against it. In those circumstances it is not necessary to go further and consider the application for review of the decision declining to strike out the cause of action against the Firm.

Result

[94] The appeal is allowed. Summary judgment is granted to the appellants on the cause of action against them.

[95] The respondent must pay the appellants costs for a standard appeal on a band A basis and usual disbursements.

[96] The orders for costs in the High Court are quashed. The respondent must pay the appellants costs and disbursements in the High Court in the amount of $22,939.

Solicitors:
McElroys, Auckland for Appellants
Queen City Law, Auckland for Respondent