



## The High Court clarifies solicitors' duty of care to an intended beneficiary under a will - *Badenach v Calvert*

When does a solicitor have a duty of care to an intended beneficiary when approached to draft a will? The High Court's decision of 11 May 2016 in *Badenach v Calvert*<sup>1</sup> overturned a decision of the Full Court of the Tasmanian Supreme Court, to find that in the circumstances of that case, a solicitor **did not** owe an intended beneficiary a duty of care to advise the testator of the options available to him to avoid exposing his estate to a claim under family provision legislation. In doing so, the High Court has clarified the limits of a solicitor's duty of care to an intended beneficiary under a will, a duty recognised by the High Court in its 1997 decision in *Hill v Van Erp*.<sup>2</sup>

In *Hill v Van Erp*, a solicitor had, in accordance with her client's instructions, prepared a will pursuant to which part the client's property was to be given to her friend, Mrs Van Erp. When the will came to be signed and witnessed, the solicitor asked Mrs Van Erp's husband to sign the will as an attesting witness, with the result that the disposition of property to Mrs Van Erp was void. In that case, Mrs Van Erp successfully argued that the solicitor had breached a duty of care toward herself as the intended beneficiary.<sup>3</sup> The disappointed beneficiary in *Badenach* similarly sought to establish a case for negligence against the testator's solicitor.

### Facts

The solicitor, Mr Badenach, had received instructions from his client to prepare a will that passed the whole of his estate to Mr Calvert, who was the son of his client's long-term de facto partner, and who he treated as a son. The client died later the same year, having executed a will drawn in accordance with his instructions. The property to be transferred to Mr Calvert under the will consisted of two properties which the client owned as a tenant in common in equal shares with Mr Calvert.

However, the client's intentions could not be carried into effect, because after the client's death, his estranged daughter from a previous marriage made a successful claim under the Tasmanian *Testator's Family Maintenance Act 1912 (TFM Act)* that provision be made for her out of the client's estate. The estate intended to be passed to Mr Calvert was thereby substantially depleted.

Mr Calvert brought proceedings against the solicitor and his firm, claiming the solicitor had been negligent in failing to advise the client of the possibility that his daughter might make a claim under the TFM Act and the options available to him to reduce or extinguish his estate in order to avoid such a claim, such as by converting his and Mr Calvert's interest in the two properties to joint tenancies (so the properties would pass to Mr Calvert by survivorship), or by making inter vivos gifts to Mr Calvert. Relying on *Hill v Van Erp*, Mr Calvert alleged that these acts were breaches of the duty of care that the solicitor and his firm owed to Mr Calvert as the intended beneficiary of the client's estate.<sup>4</sup>

### First instance decision

At first instance, Blow CJ of the Tasmanian Supreme Court accepted expert evidence of an experienced solicitor, to find that the solicitor owed the client a duty of care (in contract and in

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<sup>1</sup> [2016] HCA 18.

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

<sup>3</sup> *Badenach v Calvert* [2016] HCA 18 at [14]-[15] per French CJ, Kiefel and Keane JJ.

<sup>4</sup> *Badenach v Calvert* [2016] HCA 18 at [4] per French CJ, Kiefel and Keane JJ.

tort) to ask whether the client had family, and upon learning that the client had a daughter, to warn the client of the risk that his daughter might make a family provision claim against his estate. However his Honour was not satisfied, on the balance of probabilities, that a conversation about a possible family provision claim by the client's daughter would have triggered an enquiry by the client about ways of protecting Mr Calvert's position. In these circumstances, his Honour was not satisfied that the solicitor owed the client, let alone Mr Calvert, a duty to volunteer advice about options available to the client to avoid a claim against his estate under the TFM Act.<sup>5</sup>

### Decision of the Full Court

Mr Calvert appealed, and the Full Court (Tennent, Porter and Estcourt JJ) held that the solicitor breached his duty of care to the client, not only by failing to warn the client of the risk that his daughter might make a family provision claim, but also by failing to volunteer advice to the client regarding steps the client could take to avoid exposing his estate to such a claim. Those omissions, the Full Court held, also breached a consistent and coextensive duty of care that the solicitor owed to Mr Calvert.<sup>6</sup>

### High Court decision

By grant of special leave, the solicitor and his firm appealed to the High Court. The appellants did not dispute that the solicitor owed a duty of care to the client to enquire about his family, and when informed of the existence of the daughter, to advise that she may make a family provision claim against the estate. What was at issue was whether more was required,<sup>7</sup> namely whether the duty extended to volunteering advice about how to avoid a family provision claim.

The High Court unanimously allowed the appeal from the Full Court's decision, and in three separate but concurring judgments, found that the solicitor did not owe the alleged duty to Mr Calvert.

The majority (French CJ, Kiefel and Keane JJ) distinguished *Hill v Van Erp*, on the basis that in that case, the interests of the client and the intended beneficiary were aligned, whereas in the present case they were not. In *Hill v Van Erp*, both the testatrix and the intended beneficiary had the same interest in the testatrix's testamentary intentions (which were finalised) being carried into effect. Therefore recognising a duty to the intended beneficiary would not involve any conflict with the duties owed by the solicitor to her client.<sup>8</sup>

In the present case, however, the solicitor's duty to the client was limited to enquiring about the client's family and advising of the possibility of a family provision claim against the estate.<sup>9</sup> The duty to the client did not extend to volunteering advice about how to avoid a family provision claim, because there is no way of knowing what the client's instructions would have been once informed of the possibility of a claim.<sup>10</sup> The client could have instructed the solicitor to take every step to avoid such a claim, but equally, he could have maintained his original instructions and allowed events to take their course, or made provision for his daughter in the will. The client's testamentary intentions were not 'finalised' in the way that they were in *Hill v Van Erp*.<sup>11</sup> In these circumstances, their Honours considered that the interests of the client and the intended beneficiary were not aligned. Therefore the contended duty of care of the solicitor to Mr Calvert did not arise.<sup>12</sup>

Their Honours also found that Mr Calvert had not established that the alleged breach of duty caused the relevant loss.<sup>13</sup>

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<sup>5</sup> *Badenach v Calvert* [2014] TASSC 61 at [25] per Blow CJ.

<sup>6</sup> *Calvert v Badenach* [2015] TASFC 8 at [22] per Tennent J, [78] per Porter J and [116]-[117] per Estcourt J.

<sup>7</sup> *Badenach v Calvert* [2016] HCA 18 at [27] per French CJ, Kiefel J and Keane J.

<sup>8</sup> *Badenach v Calvert* [2016] HCA 18 at [18] per French CJ, Kiefel J and Keane J.

<sup>9</sup> *Badenach v Calvert* [2016] HCA 18 at [31] per French CJ, Kiefel J and Keane J.

<sup>10</sup> *Badenach v Calvert* [2016] HCA 18 at [31] per French CJ, Kiefel J and Keane J.

<sup>11</sup> *Badenach v Calvert* [2016] HCA 18 at [29]-[33] per French CJ, Kiefel J and Keane J.

<sup>12</sup> *Badenach v Calvert* [2016] HCA 18 at [42]-[49] per French CJ, Kiefel J and Keane J.

<sup>13</sup> *Badenach v Calvert* [2016] HCA 18 at [34]-[41] per French CJ, Kiefel J and Keane J.

## Key points - the significance of the decision for solicitors in NSW

The following points can be taken from the High Court's decision, regarding a solicitor's duty to an intended beneficiary when drafting a will:

- A solicitor approached to draft a will will not always have a duty of care to an intended beneficiary.
- Such a duty will only arise where there is a concurrence between the interests of the client and the interests of the intended beneficiary.
- An important factor in determining whether there is such a concurrence of interests is whether the testator's testamentary intentions have been finalised, after the client has received all necessary advice from their solicitor.

In this way, the High Court's decision in *Badenach v Calvert* gives solicitors in New South Wales greater clarity regarding the limits of their duty of care to third parties when instructed to draft a will.

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