Important Warning: Will Drafting

- By Grant Feary, Senior Solicitor

The recent decision of Calvert v Badenach (24 July 2015) should be carefully considered by all practitioners engaged in testamentary practice as it signals an extension of the duties of a solicitor advising as to the making of a will.

Practitioners will be aware that Law Claims prepares an annual summary of cases and legislation affecting the liability of practitioners – Riskwatch News. One of the cases referred to in the 2014 Riskwatch News (published early in 2015 and available on the Law Society website) was an interesting Tasmanian case – Calvert v Badenach [2014] TASSC 61 24 November 2014 – concerning the duties of a solicitor when preparing a will regarding taking instructions and giving advice as to claims which might be made against the estate under Testator’s Family Maintenance (“TFM”) legislation (such as the Inheritance (Family Provision) Act 1972 SA).

The Riskwatch News summary of this case concluded as follows:-

“It is still an open question as to whether or not a solicitor owes a duty to an intended beneficiary, and not just the testator, to advise as to TFM claims.”

The facts of Calvert v Badenach were that a testator gave instructions to the defendant solicitor to prepare a will leaving the testator’s entire estate to the plaintiff, who was not related to the testator, but whom the testator treated like a son. He was in fact the son of a woman who had been the testator’s partner for many years. The testator had a daughter, for whom no provision was made in the will. After the testator’s death, the daughter made a claim under the TFM legislation and was awarded $200,000.00.

The testator and the plaintiff owned the properties which made up the bulk of the estate as tenants in common. If the testator had, during his lifetime, made arrangements so that the properties were held with the plaintiff as joint tenants the properties would not have formed part of his estate and would have passed to the plaintiff on the testator’s death. Alternatively, he could have, during his lifetime, made gifts or transferred other assets to the plaintiff.

The Trial Judge (Blow CJ) found that the solicitor owed the testator a duty to advise in relation to possible TFM claims and that he breached that duty.
The Court did not find it necessary to decide whether or not in these circumstances the solicitor owed a duty to the plaintiff, because the Court was not satisfied that, even if the testator had been advised as to the possible circumventing of the TFM legislation he would have, in fact, taken steps to create the joint tenancies or otherwise transfer assets as alleged by the plaintiff.

On 24 July 2015 the Tasmanian Full Court overturned Blow CJ’s decision – see Calvert v Badenach [2015] TASFC 8 –such that we now may have an answer to that open question.

The Full Court felt that the Trial Judge had erred in deciding the matter on the grounds of causation; i.e. Blow CJ was not satisfied on the evidence that the testator would have actually created joint tenancies in respect of the properties and therefore the plaintiff’s claim failed in toto. The Full Court judges saw the matter clearly as a “loss of opportunity” case and found that it should have been dealt with on that basis. This was notwithstanding the fact that the plaintiff’s case was not pleaded or run as a “loss of opportunity” case, apart from some submissions along those lines from the plaintiff’s counsel at trial (which Estcourt J in the Full Court described as “at best Delphic” [132]).

Estcourt J said:

"The appellant’s case was always a loss of chance case. It could never have been anything else. The evidence before Blow CJ could not establish that had the testator received proper advice he would have acted as advised. Blow CJ, again with respect, was correct when he listed the possible reactions of the testator to such advice. To suggest that the testator would have acted in a particular way is speculative or conjecture. However, the testator was not given proper advice, and, as a result, he was not given the opportunity to choose how he should proceed. As a result of that the appellant lost the chance of a better outcome under the will” [131].

(emphasis added)

As to the existence of a duty of care owed by the solicitor to the plaintiff – not just the testator – the Full Court found that there was such a duty and that the Trial Judge’s formulation of the solicitor’s duty was unnecessarily confined (see Tennent J. at [18-19]).

As to the contents of that duty, Tennent J said:

“Against that background, in my view, the duty of care owed by the respondents to the testator was much more extensive than that which the learned trial judge set out. The first respondent owed a duty of care to the testator to, not only enquire of him whether he had any children, but also to advise him why that enquiry was being made, the potential for a TFM claim, the impact that could have on his expressed wishes, and of possible steps he could consider to avoid the impact. It did not need to extend to ensuring any such advice was accepted and acted upon.” [21] (emphasis added)

The matter was remitted to a single judge (not the Trial Judge) – for an assessment of damages on the question of the value of the lost opportunity.