

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**CIV 2016-485-000919
[2017] NZHC 1832**

BETWEEN MARK ROBERT SANDMAN
Plaintiff/Respondent

AND ROBERT JARRARD GIBONEY AND
COLIN CHARLES MCKAY as executors
of the estate of Elisabeth Nancy sandman
First Defendants/Applicants

AND COLIN CHARLES MCKAY, ROGER
DAVID CANN AND DAVID JOHN
CLARK solicitors practicing in
partnership of Wilson McKay
Second Defendants/Applicants

Hearing: 27 July 2017

Appearances: R M Dillon for the Plaintiff/Respondent
P Hunt/A Colgan for the Defendants/Applicants

Judgment: 4 August 2017

JUDGMENT OF ASSOCIATE JUDGE CHRISTIANSEN

*This judgment was delivered by me on
04.07.17 at 3:30pm, pursuant to
Rule 11.5 of the High Court Rules.*

*Registrar/Deputy Registrar
Date.....*

[1] The second defendants apply to strike out the plaintiff's (Mr Sandman) proceeding against them or for summary judgment, and in the alternative for security for costs.

[2] Mr Sandman pleads various causes of action against the executors of the estate of his mother, Elisabeth Sandman (Mrs Sandman), who died in October 2013 and seeks a recall of probate of the Will executed by her in 2010 (the 2010 Will).

[3] The second defendants (Wilson McKay) are practising solicitors and acted on various matters for Mrs Sandman in the latter years of her life and in the administration of her estate following her death.

[4] The statement of claim pleads just a single cause of action against Wilson McKay – described as “knowing assistance”.

[5] Wilson McKay submits the plaintiff's cause of action can be struck out and dismissed summarily. It says a cause of action for dishonest assistance or accessory liability requires, firstly, a trust or fiduciary relationship, second, a breach of that, and third, knowing and dishonest assistance by Wilson McKay.

[6] Wilson McKay say Mr Sandman has not pleaded those elements which he should have, and therefore there is no valid cause of action and the claim should be struck out. Further, it is Wilson McKay's position that sufficient affidavit evidence has been provided to show that a claim of dishonest assistance cannot be sustained meaning summary judgment could be entered in its favour without need to resolve any factual disputes.

[7] In the event neither strike out nor summary judgment orders are made, Wilson McKay applies for security for costs.

Background

[8] Mrs Sandman executed a Will in 2005 (the 2005 Will) prepared by Guardian Trust. By it she left an apartment to Mr Sandman and \$200,000 to her daughter Vicki. The residual estate was to be divided equally between Mr Sandman and his

sister Vicki. Mr Sandman was to receive the whole of his mother's estate if Vicki predeceased her mother.

[9] Wilson McKay was first instructed by Mrs Sandman in 2007 when she sold her home and moved to a retirement village (the village). At that time she executed two powers of attorney (in relation to property and welfare) in favour of Vicki. That in relation to property became immediately operable; the other in relation to personal care and welfare became operable if Mrs Sandman became mentally incapable.

[10] Vicki was diagnosed with terminal cancer in 2010 and in October that year Mrs Sandman instructed Wilson McKay to prepare a new Will appointing Robert Giboney (Mr Giboney) and a partner of Wilson McKay as executors and trustees. A number of changes to distributions were made under the new Will. Mr Sandman was still to inherit the apartment but unlike the 2005 Will whereby Mr Sandman would inherit all of the residual estate if Vicki died before Mrs Sandman died, the 2010 Will required in those circumstances for Vicki's share of the residual estate to be distributed among others and not to Mr Sandman.

[11] The 2010 Will was executed on 2 December 2010 and at the same time Mrs Sandman executed two new powers of attorney (in relation to property and welfare) in favour of Vicki and this time with Mr Giboney and Leigh Giboney (Mrs Giboney) being appointed successor attorneys. Vicki died in March 2011 having disclaimed her powers of attorney.

[12] When Mrs Sandman died in October 2013 Wilson McKay in accordance with instructions in the 2010 Will obtained probate and Mr Giboney and Mr McKay of Wilson McKay were appointed executors. Wilson McKay acted in the administration of the estate. Final distributions were made by the end of 2014.

[13] Under the 2010 Will Mr Sandman received title to the apartment he occupies and as well approximately \$440,000 in other estate assets being half of the residual estate.

[14] Mr Sandman filed this proceeding in November 2016. The claim against Wilson McKay is that they knowingly assisted Vicki and/or Mr Giboney in obtaining control of Mrs Sandman's affairs and by her execution of the Will in 2010. For its purpose of applying for summary judgment Wilson McKay applies for leave to bring that application per Rule 12.4(3) of the High Court Rules. The application for summary judgment was filed on 22 March 2017 or about three months after being served with Mr Sandman's proceeding, and approximately six weeks after Wilson McKay's statement of defence was filed.

[15] It is clear there is no prejudice to Mr Sandman by permitting consideration of the summary judgment application. Leave to apply is accordingly granted.

Mr Sandman's statement of claim

[16] The statement of claim has been prepared by Mr Sandman with the assistance of Mr Dillon who represented Mr Sandman in another and related Family Court proceeding. Mr Sandman was to appear for himself upon these applications but due to an injury did not. Mr Dillon has been instructed in Mr Sandman's absence.

[17] Mr Sandman pleads that when the Will was prepared for Mrs Sandman she lacked testamentary capacity. The 2010 Will was prepared by and witnessed by Ms Paul then an employee of Wilson McKay.

[18] Mr Sandman pleads :

5. The 2010 will was executed by the deceased when she lacked testamentary capacity. The lack of capacity is evidenced by:

(a) On 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.

(c) The doctor acting for the deceased sought an assessment of the deceased for mild dementia in February 2010.

(d) The deceased was assessed as having mild cognitive impairment in March 2010.

(e) The deceased was admitted to hospital for a fall in July 2010, at which time she was unable to consent to her medical operation, and the clinical admission notes recorded that she had become reclusive and dependant on her daughter Vicky. The notes record the deceased had mild dementia which meant she could not consent to the operation and was vulnerable to repeat episodes of confusion and agitation. Vicky consented to the operation on behalf of the deceased.

(f) The deceased was discharged in August 2010, and the discharge report noted the deceased had suffered post-operative delirium, was suffering mild dementia, and had an MMSE score of 12/30 (where anything less than 23 shows cognitive impairment).

(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 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 date 31 August) was rendered nominally to the deceased but again care of Vicky, for that advice.

(i) The care plan instigated by the rest home where the deceased was living in September 2010 proceeded with her care on the basis of her dementia at an MMSE score of 12/30.

(j) Full time care givers were employed to assist the deceased in her daily routine in September 2010. The wages for care givers were paid for from the accounts of the deceased, then operated by the first named First Defendant.

(k) On or about the 21st September 2010 the in-house doctor at the rest home assessed the deceased as having an MMSE score of 19/30.

(l) On 27 September 2010 Vicky provided the first named First Defendant with her own Enduring Power of Attorney ("Vicky's EPA"), Vicky's EPOA was prepared 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 date (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.

(p) On the 2nd December 2010, James Langton visited the deceased, who advised him that she had received a visit from some lawyers earlier that day, but had no idea why they had come or what they had discussed with her.

(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.

6. The deceased did not have the ability to comprehend or recollect the extent of her estate or to comprehend the appropriate claims of persons on her estate when she signed the 2010 will. The 2010 will reflected the intentions of Vicky, regarding the disposition of the estate of the deceased, in light of Vicky's own pending death.

7. The deceased executed a will dated 15 December 2005 ("the 2005 will") appointing The New Zealand Guardian Trust Company Limited ("Guardian Trust") as executor and trustee (a copy of which will is annexed hereto and pleaded in full). The 2005 will remains in the possession and control of Guardian Trust.

[19] In overview it is Mr Sandman's claim against Mr Giboney and Mr McKay that Mrs Sandman lacked testamentary capacity, and/or lacked knowledge and approval, and/or was unduly influenced in respect of her execution of the 2010 Will. His claim against Wilson McKay is that they "knowingly assisted" Vicki and/or Mr Giboney in obtaining control of Mrs Sandman's affairs in the execution of the 2010 Will. With regard to the claim of "knowing assistance" Mr Sandman at paragraph 23 of his statement of claim pleads:

Throughout 2010 [Wilson McKay] knowingly assisted Vicki and/or the first named First Defendant [Mr Giboney] 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 Vicki's own intentions regarding the disposition of the estate of the deceased.

Dishonest assistance/accessory liability

[20] As Mr Hunt for Wilson McKay observes, this pleading appears to be a reference to the cause of action more commonly referred to as “dishonest assistance” (and sometimes as “accessory liability”). Mr Hunt refers to the Privy Council decision in *Royal Brunei Airlines* which held that where a third party dishonestly assists a trustee to commit a breach of trust, the third party will be liable to the beneficiary for the loss occasioned even though the third party has received no trust property. As Mr Hunt notes the Privy Council found that liability for knowing or dishonest assistance is, therefore, “a form of secondary liability in the sense that it only arises where there has been a breach of trust”.

[21] The underlying rationale for the cause of action was set out in *Royal Brunei* by Lord Nicholls¹:

... Stated in the simplest terms, a trust is a relationship which exists when one person holds property on behalf of another. If, for his own purposes, a third party deliberately interferes in that relationship by assisting the trustee in depriving the beneficiary of the property held for him by the trustee, the beneficiary should be able to look for recompense to the third party as well as the trustee. Affording the beneficiary a remedy against the third party serves the dual purpose of making good the beneficiary’s loss should the trustee lack financial means and imposing a liability which will discourage others from behaving in a similar fashion.

The rationale is not far to seek. 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. There is a close analogy with breach of contract. A person who knowingly procures a breach of contract, or knowingly interferes with the due performance of a contract, is liable to the innocent party. The underlying rationale is the same.

... This is an objective standard.

[22] *Royal Brunei* was applied in the New Zealand case of *Burmeister v O’Brien*²:

¹ *Royal Brunei Airlines Sdn Bhd v Ming* [1995] 2 AC 378 (PC) at 386.

² (2009) 12 TCLR 539 (HC).

[23] *In Burmeister Asher J* noted that the approach to accessory liability (or, as it is sometimes called dishonest assistance) as established in *Royal Brunei* applied in New Zealand; that the rationale was that beneficiaries were entitled to expect that those who became trustees would fulfil their obligations. His Honour then noted that the defining ingredient was dishonesty and he also noted that the words “unconscionable” or “knowingly” were imprecise and do not help. His Honour said the essence of accessory liability was that the wrongdoer dishonestly assisted in a breach of trust. His Honour then accepted the summary of the legal position of Smellie J in *Equiticorp Industries Group Limited v The Crown*³.

In respect of the dishonest assistance claims (as the accessory liability claims are more properly described) the requirements are first (as in the recipient causes of action) that the plaintiffs have lost their money as a result of breaches of fiduciary duty or unauthorised acts. Secondly, that the [defendant] participated, by helping or assisting in those breaches. Thirdly, dishonesty (objectively assessed) on the part of the [defendant].

[24] Asher J then noted:

[96] Accessory liability applies to persons dealing with trustees. The issue of whether it can apply to the dishonest assistance of breaches of fiduciary duty generally as distinct from breaches of an express trust has been flagged in England.

...

Smellie J assumed that it was necessary to show a breach of fiduciary duty. Given that the underlying rationale is to ensure that trustees fulfil their obligations, I consider that approach to be correct. It is not necessary for there to be assistance of a breach of an express trust for the claim to be established. It is sufficient if the breach is of fiduciary duty arising out of a constructive trust.

[25] It seems to this Court that the essence of a claim must plead a breach of fiduciary duty arising out of a trust relationship. It may follow therefore that duties owed by a power of attorney or an agent may be subject to different considerations.

[26] Mr Sandman alleges there was “knowing assistance” of Vicki and Mr Giboney in taking control of Mrs Sandman’s affairs. Mr Sandman says he was a beneficiary of fiduciary duties owed to Mrs Sandman and that he was a beneficiary of a “moral duty” owed by Mrs Sandman to him (enforceable pursuant to the

³ [1998] 2 NZLR 481.

provisions of the Family Protection Act 1955) and of which Wilson McKay was aware. Mr Sandman says Wilson McKay “owed fiduciary duties to my mother, whom they breached, and caused harm to me, being a person in contemplation as likely to suffer harm as a beneficiary under the 2005 Will...”.

[27] It is Wilson McKay position that even if there existed the necessary chain of relationships under which accessory liability could be possible, that there was no breach of trust or fiduciary duty in which it could have participated because the cause of action alleged is accessory in nature and it could only arise where there has been an underlying breach by a trustee or fiduciary. Claims that Mrs Sandman was induced or influenced are rejected by Wilson McKay but even if there was such control or influence it did not involve any dealing or interference with property in a manner a Court could acknowledge.

[28] Regarding claims of knowing dishonest assistance, Mr Hunt submits it is clear that it is not sufficient to show knowledge of circumstances which would indicate the facts or “put an honest and reasonable person on enquiry”⁴.

[29] Wilson McKay accepts it drafted and facilitated the execution of the 2010 Will but it does not accept Mrs Sandman was induced or influenced into executing the Will by the actions or control of Vicki or Mr Giboney, or that she lacked the requisite capacity.

[30] It is Wilson McKay’s case that the statement of claim does not disclose a reasonably arguable cause of action against it. Mr Hunt submits the absence of any one of the elements of “dishonest assistance” ought to be sufficient to find that the cause of action cannot succeed. He submits that arguably none of those elements are present either in the pleadings or on the available facts.

[31] If it appears to a Court that the issues are more about matters of pleading than where appropriate an opportunity will be provided by the Court to permit a cause of action to be repleaded rather than struck out.

⁴ Andrew Butler *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at [18.5.7] and [18.2.2(1)].

[32] The focus for this Court upon the strike out application is whether the necessary elements of the cause of action are sufficiently supported by reference to manner of pleading or available evidence.

The Facts

Generally

[33] For present purposes the Court should accept as provable the facts as pleaded on behalf of Mr Sandman.

The evidence of Ms Paul of Wilson McKay

[34] The affidavit of Ms Paul then a senior associate at Wilson McKay provides a comprehensive review of the services Wilson McKay provided to Mrs Sandman. She recalls being instructed by Mrs Sandman in 2007 on the sale of her Remuera home and the purchase of an occupation licence at a retirement village. It was a requirement of the village's occupation licences that residents execute and keep in force enduring powers of attorney for both property and personal care. Ms Paul says that after explaining the options to Mrs Sandman she was instructed to prepare and assist in the execution of two powers of attorney in favour of Vicki. She recalls at that time Vicki was a successful businesswoman and was close to her mother. She recalls no mention by Mrs Sandman of Mr Sandman.

[35] In February 2010 Ms Paul attended Mrs Sandman at the retirement village to discuss concerns she had regarding her affairs. Vicki, she said, was also present at the meeting on her mother's request.

[36] Ms Paul said Mrs Sandman was concerned about the terms of the 2005 Will she having since provided Mr Sandman with rent free accommodation in her Newton apartment for many years and was receiving a weekly allowance from his mother. It was Mrs Sandman's position that Vicki was being treated unfairly in the 2005 Will. Vicki said she did not want Mrs Sandman to change her Will and at that time there was no change.

[37] In mid-2010 Mrs Sandman had a fall and broke her other hip and after she was discharged from hospital Vicki called Ms Paul expressing concern that the village was worried about Mrs Sandman's ability to cope in her independent apartment. Ms Paul wrote to Mrs Sandman to bring her attention to the occupation agreement terms which would give rise to grounds for the village to terminate her licence. Ms Paul said she did not state or infer that the village was seeking to terminate the agreement due to dementia. Ms Paul's understanding was that the village's concerns were only in relation to Mrs Sandman's physical health.

[38] Ms Paul said that if the village had concerns about Mrs Sandman's mental health (or if she had the severe dementia that had developed by the time incapacity certificates were executed in 2012), then she did not believe the village would have consented to her remaining in her independent apartment.

[39] Ms Paul visited Mrs Sandman on 19 October 2010 she having been invited by Mrs Sandman to take instructions for a new Will. Both Vicki and Mrs Sandman's caregiver were present at that meeting when Vicki advised she had been diagnosed with cancer. After making morning tea the caregiver left. Vicki was present at Mrs Sandman's request and knew Ms Paul was there to take new Will instructions. New instructions were given as to executors, special bequests and the Newton apartment. Ms Paul said Mrs Sandman confirmed she still wished for the Newton apartment to go to Mr Sandman. Vicki told her mother she did not want a separate amount to compensate for Mr Sandman receiving the Newton apartment, saying she was fine financially.

[40] Ms Paul recalls discussions regarding chattels. Mrs Sandman reaffirmed her request for her shares, bonds and bank deposits to be split equally between Vicki and Mr Sandman as per the 2005 Will.

[41] Ms Paul reviewed in detail discussions regarding options for the purpose of considering bequests to persons other than just her children. Mrs Sandman recalled her and her late husband having supported Mr Sandman for years and said that he had wasted money. Ms Paul recommended these comments should be recorded in

writing to explain why she was leaving Vicki's share to other family instead of to Mr Sandman.

[42] Ms Paul commented that while Mrs Sandman was upset about the reasons she was changing her Will she was clear in her instructions; that Mr Sandman would inherit a freehold apartment and a substantial amount of money and that she wanted other family and friends to benefit in the event that Vicki did not outlive her.

[43] Ms Paul was satisfied that Mrs Sandman had the capacity and understood she was making a new Will and as well what the main change from the 2005 Will would be. Ms Paul stated "Indeed, she made it clear that this was the very reason she wanted to execute a new Will".

[44] Ms Paul says that she did not see any evidence that Vicki was attempting to influence her mother or change her Will, or have any say in distribution to other friends and family. Ms Paul comments that Vicki's only influence during the meeting was telling her mother she did not want to be compensated for Mr Sandman getting the Newton apartment.

[45] Mrs Sandman instructed Ms Paul to send a copy of the draft Will to her care of Mr Giboney. She said she did not want it sent to her directly in case Mr Sandman collected the mail or saw it around her apartment. Ms Paul says following the meeting she wrote to Mrs Sandman on 21 October 2010 care of Mr Giboney summarising the instructions she had received. The letter also suggested that although Ms Paul was confident Mrs Sandman had testamentary capacity, it would be prudent in the circumstances to obtain a certificate from her doctor to confirm this.

[46] Ms Paul deposes:

[24] On 27 October 2010 I emailed Mrs Sandman's doctor of eight years, Doctor Jane Buckley, to request that she provide a medical certificate to confirm that she had the mental capacity to understand that she was making her Will and disposing of her assets... The following day I received a fax from Doctor Buckley in response. Although she hadn't visited Mrs Sandman, she confirmed her opinion, based on her visit on 30 September [2010], that Mrs Sandman did have the required mental capacity.

[47] Ms Paul wrote again to Mrs Sandman noting that instructions were still awaited regarding shares of the estate that were to be given to various beneficiaries under the proposed new Will.

[48] In response to Ms Paul's suggestion that the apartment might then be transferred to Mr Sandman, Mrs Sandman confirmed that she had sufficient funds to meet any ownership costs meanwhile, and said she was concerned that Mr Sandman might sell or mortgage the apartment.

[49] Ms Paul recalls around this time there had been correspondence from Mr Sandman to Mr Giboney regarding Mr Sandman's own medical condition and in relation to control over Mrs Sandman's affairs. Ms Paul wrote to Mr Sandman on 5 November 2010. She said her main purpose in doing so was to confirm that Mrs Sandman had both capacity and the legal right to chose who she wished to assist with her financial and other affairs. With Mrs Sandman's consent she included a copy of the certificate from Doctor Buckley as to her capacity.

[50] Ms Paul deposes having received further instructions, as to the disposition of property from Mrs Sandman, via Mr Giboney as she said Mrs Sandman suffered hearing loss and found long phone conversations difficult.

[51] A draft Will was sent to Mrs Sandman on 15 November 2010. Ms Paul says given Vicki's health she advised it would be prudent for arrangements to be made for successor powers of attorney. Mrs Sandman instructed her she wished to appoint Mr Giboney as successor attorney for property and Mr Giboney's wife, Leigh as successor attorney for personal care and welfare.

[52] Ms Paul deposes:

[29] Once final details had been finalised I arranged to attend on Mrs Sandman on 2 December 2010. Given that Wilson McKay had acted for Vicki in respect of other matters, I arranged for Mrs Sandman to obtain independent legal advice from Ian Mellett of Quay Law before executing the new powers of attorney. Details of this request were set out in my letter to Quay Law on 1 December 2010.

[53] Ms Paul was concerned that reasons for the change be recorded in writing by Mrs Sandman and for that reason she prepared a statutory declaration for Mrs Sandman to execute, using the information Mrs Sandman had provided, so as to be clear that she understood and intended to change the distribution that would occur under her new Will, especially in relation to what would go to Mr Sandman.

[54] Ms Paul attended Mrs Sandman at her village apartment on 2 December 2010 when her caregiver, Vicki and Mr Giboney were present because Vicki and Mr Giboney had to sign powers of attorney. Then Mr Mellett arrived and Ms Paul took him to introduce him to Mrs Sandman. Ms Paul said Mr Mellett and Mrs Sandman were left so that he could provide her with independent advice. When they returned Mrs Sandman, Vicki and Mr Giboney signed the new powers of attorney for property and personal care and welfare and each was accompanied by a certificate from Mr Mellett stating 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.

[55] Ms Paul then deposes:

[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 (2010 Will), witnessed by the caregiver and myself... and the statutory declaration regarding her intentions under the 2010 Will... I then left with the signed documents. From memory the power of attorney for personal care and welfare was signed by Leigh Giboney later that day at Wilson McKay's offices (witnessed by me).

[34] Throughout the period leading up execution of the 2010 Will Mrs Sandman was clear that she wanted Mark to have the apartment, but wanted her friends and family to have the other half of the balance of her estate if Vicki died before her. Her reasons for this were reflected in the statutory declaration.

Mr Sandman's evidence in response

[56] Mr Sandman says Ms Paul's account does not adequately describe the full state of Mrs Sandman's mental health during 2010. In support of his position Mr Sandman refers to an affidavit he swore in a pleading he filed in the Family Court in 2015 (which proceeding has now been transferred to the High Court). To that

affidavit he attached parts of records obtained from the Auckland District Health Board. That proceeding also includes a number of affidavits sworn by others in support of Mr Sandman.

[57] One of those was an affidavit sworn by James Langton on 4 August 2015 – who deposed that in September 2010 Vicki told him that Mrs Sandman had dementia and would not understand or cope with the knowledge of the fact that Vicki had been diagnosed with inoperable terminal brain cancer and had less than six months to live. Mr Langton recalls having driven Vicki to Mrs Sandman’s apartment. In his view Mrs Sandman clearly had dementia. He said he visited Mrs Sandman the same afternoon that she had signed the 2010 Will and power of attorney. He said Mrs Sandman told him that she had received a visit from some lawyers but had no idea why they had come to see her. It was Mr Langton’s observation that Mrs Sandman had no knowledge that she signed a new Will or power of attorney and would not have been in a capable position to understand the nature or affect of those documents she signed.

[58] Another affidavit, of James Mitchell deposes that in his view it was “completely inappropriate for Liz [Mrs Sandman] to give power of attorney to Vicki in December 2010. First, Liz did not have capacity to understand what she was doing. Second she had not been told of Vicki’s illness because she did not understand. Third, it was not the actions of a sensible person in command of their affairs and faculties to give a power of attorney to someone who would very soon be dead”. Mr Mitchell was concerned that Mr Giboney had ignored requests from Mr Sandman for financial assistance to deal with his own medical issues.

[59] Mr Sandman challenges the reliability of aspects of Ms Paul’s affidavit. He comments, *inter alia*:

- (a) Because enduring powers of attorney were granted to Vicki in 2007, new ones would not have been required in 2010.
- (b) Vicki was present when Mrs Sandman’s Will was discussed in February 2010.

- (c) Vicki's actions in contacting Wilson McKay about the termination of the village occupation licence confirmed she was acting as Mrs Sandman's attorney "well before the execution of the new documents".
- (d) Vicki was present when new Will instructions were given.
- (e) Ms Paul's subsequent letter to Mr Giboney noted the need to obtain medical advice regarding Mr Sandman's capacity to execute a Will.
- (f) Ms Paul was aware of Mr Sandman's concern regarding control by Vicki of his mother's affairs.
- (g) Instructions for changes to the Will were received from Mr Giboney.
- (h) It is inexplicable why Mrs Paul copied Mr Sandman on a letter written to Vicki and Mr Giboney regarding proposed changes to the Will.
- (i) Aware of the effect of the changes to the Will on Mr Sandman, Ms Paul prepared a document for Mrs Sandman to sign.
- (j) Vicki must have been present while the Will was being executed.
- (k) It is clear Mr Giboney had been acting for Mrs Sandman for some time after the Will was signed. This is to be contrasted with advice given to him by Wilson McKay that Mr Giboney had only been acting as attorney for Mrs Sandman since 10 August 2012.

Legal considerations

On behalf of Wilson McKay

[60] Mr Hunt submits that clearly in these events Wilson McKay had various fiduciary obligations to Mrs Sandman as her solicitors. Mr Sandman urges the Court to consider that in the circumstances those duties also extended to him.

[61] Clearly the primary duties were owed to Mrs Sandman and there is no pleading by the statement of claim that Wilson McKay breached that duty of care to Mrs Sandman.

[62] It is Wilson McKay's case that:

- (a) Claims of breach of duty affecting Mr Sandman could not occur until Mrs Sandman died. This notwithstanding claims of knowing assistance were alleged to have occurred in the events detailed during 2010.
- (b) Prior to December 2010 Vicki held powers of attorney for Mrs Sandman and the power in relation to personal care and welfare had not been invoked and the power in relation to property was still coextensive with Mrs Sandman's own powers as she was not certified as being mentally incapacitated until August 2012.
- (c) To the extent that Vicki exercised her power of attorney as an agent in relation to property during 2010 she would have owed fiduciary duties to Mrs Sandman in any transaction she conducted as an agent but there is no basis for holding that such duties as were then owed were extended to Mr Sandman.
- (d) It follows therefore that there was no trust relationship or fiduciary relationship in connection with a constructive trust that was sufficient to found a dishonest assistance cause of action as is pleaded in this case.
- (e) While undue influence provides a ground for challenging a Will it does not follow that the person or persons exercising that influence do so in breach of trust. If Vicki or Mr Giboney had exercised influence or control then their actions would provide a breach of fiduciary duty only when those were done in the course of exercise of their authority.

The response on behalf of Mr Sandman

[63] Considerable evidence has been provided by/on behalf of Mr Sandman. The importance of this is explained by his account that there is sufficient in that evidence to provide dishonesty and therefore that claims of his proceeding being clearly untenable cannot succeed. In support of that, he strongly relies upon evidence to show what happened prior to when the Will was signed and also in the year following the signing of the Will.

[64] Mr Sandman's case also relies upon the decision of *Royal Brunei Airlines*, which he notes refers to a dishonest solicitor procuring a breach of trust by an unwitting trustee and in that process trustee beneficiaries having been defrauded.

[65] In Mr Dillon's submission the decision of the Privy Council is a complete answer to Wilson McKay's claims that the proceeding should be struck out or summary judgment entered.

[66] Mr Dillon submits:

- (a) There are clear breaches of duty by Wilson McKay to Mrs Sandman because they did not protect Mrs Sandman from the undue influence of their other client, Vicki.
- (b) That Wilson McKay reported on the affairs of Mrs Sandman to third parties in circumstances whereby in doing so they breached confidentiality and indicated knowledge of the lack of capacity of Mrs Sandman.
- (c) That if Mrs Sandman did not have the capacity to make a Will or give a power of attorney then the actions of assisting her make those documents and then utilising those in the management of her affairs both before and after her death, are unauthorised acts and therefore were committed in breach of fiduciary duties.

- (d) That such duties need not necessarily be owed to Mr Sandman but that when a solicitor becomes aware of the existence of relationships giving rise to duties by a “trustee” to third parties, then the state of mind of the solicitor is engaged.

[67] Mr Dillon says Wilson McKay knew prior to the 2010 Will that Vicki was terminally ill; and in that context new Wills and powers of attorney were created including a power of attorney given to someone who already had a power of attorney.

[68] It matters not submits Mr Dillon that the issues in this case arise in relation to a valid existing Will rather than to an existing operative trust – as had been the focus of the authority available from other cases cited; that steps taken to replace a valid [2005] Will with an invalid [2010] Will and then to implement the terms of an invalid will, must be a breach of fiduciary duties not only to the deceased but also to the beneficiaries of the valid will.

[69] The position for Mr Sandman is that it is not necessary that a breach of fiduciary duty or unauthorized acts by Wilson McKay be about duties or actions directly in respect of him. In any event he submits Wilson McKay did indeed owe such duties to take care that such actions as they undertook were not against his interests.

[70] In *Royal Brunei Airlines* dishonesty was defined as “... not acting as an honest person would in the circumstances”.

[71] Concerning the actions of Wilson McKay it is submitted those were about:

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 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. As 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.

[72] It is Mr Sandman's case that knowing/dishonest assistance caused him to lose money as a result of breaches of fiduciary duty or unauthorized acts.

[73] If his claim is to succeed he will have to prove that Wilson McKay helped or assisted in those breaches and that Wilson McKay acted dishonestly.

Review and conclusions

[74] If Mr Sandman is to succeed it must be provable that there has been a breach of trust. It is Wilson McKay's case there was no trust here but rather the claims are about events leading up to the making of a replacement Will.

[75] It needs to be proved there is a breach of trust or fiduciary relationship and that Mr Sandman was a beneficiary of that trust and that Wilson McKay knowingly and dishonestly assisted with that breach – in this case by knowingly assisting Vicki and/or Mr Giboney to obtain control of the affairs of Mrs Sandman and in particular the execution of the Will that reduced Mr Sandman's Will benefit.

[76] It is Wilson McKay's case that because Mr Giboney and Vicki were not acting in breach of a trust, there is no arguable cause of action against them.

[77] Mr Sandman's case focuses on claims of a breach of fiduciary duty by Vicki and that arose out of her power of attorney over her mother's property. But Mr Hunt submits the 2010 Will was not used to effect the property transfer and regardless the Will was signed by Mrs Sandman and one cannot construct a breach of fiduciary duty out of a power of attorney relationship because that power of attorney did not relate to a breach of trust.

[78] Allegations of fraud must be clear. Much more is needed than inferences. Mr Hunt submits that Mr Sandman's claim is all about inferences and nothing more. The evidence of Ms Paul supports a factual finding to conclude that there was no

trust and that Mr Sandman was not a beneficiary of any relationship that a Court may recognize. Therefore there was no dishonesty.

[79] Mr Hunt submits a situation of trust cannot be constructed out of the nature of the relationship between Wilson McKay and Mr Sandman, indeed much less by reference to claims of fiduciary duty because those breaches related to the use of other documents and not the Will. Wilson McKay's position is that no trust was created by its involvement and therefore no duties relating to trust arise and that there cannot be any duties owed to potential beneficiaries every time a Will is changed.

[80] Mr Hunt says Mr Sandman's case is about changes relating to the making of a Will and not about the duties of trustees in managing the estate. At no time was Wilson McKay in a position of conflict because they acted for Mrs Sandman and Vicki in a situation where Vicki was acting to aide Mrs Sandman and therefore there was no conflict of interest.

[81] Mr Hunt submits adverse inferences have been drawn where they should not have been. Because a medical certificate was obtained it did not mean Ms Paul considered there was a need for medical advice. Rather she acted in the circumstances where it was prudent to ensure a medical certificate was obtained.

[82] The fact that a lawyer reported to certain persons on instructions was what a lawyer must sometimes do and that does not infer dishonesty towards the person who was not reported to.

[83] Referring to instructions coming from Mr Giboney, Wilson McKay say that does not provide a concession that Mrs Sandman did not have the requisite mental capacity at the time.

[84] An acknowledgement that Mrs Sandman did not have mental capacity from 10 August 2012 does not mean that she did not have mental capacity before then.

[85] This is a summary judgment case. It is also about strike out but it is primarily about summary judgment and whether there is evidence to support the claim or whether it cannot succeed. Mr Sandman's case places substantial reliance upon the evidence provided by his affidavit in the Family Court proceeding in which he details his understanding of his mother's mental state in 2010. That evidence includes various medical complaints at the time and notes "8/10 dementia". That report was relatively approximate to that provided by Dr Buckley to Ms Paul.

[86] Mr Sandman relies on the affidavits of others – not doctors but close family friends. Another of those came from Mr Gotlieb a barrister who confirmed that when he approached Vicki regarding Mr Sandman's urgent need for funds to treat an urgent medical problem of his own in 2010 he was referred to Mr Giboney so that funds could be provided. Mr Gotlieb recalled there being concern about Mr Giboney controlling Mrs Sandman's funds in 2010. It is Mr Sandman's case that Vicki and Mr Giboney were in a position of influence and control by which they could arrange and procure matters affecting Mrs Sandman's welfare.

[87] A medical report dated 21 September 2010 was copied to Mrs Giboney. It recorded a medical history of dementia. It noted she presented as anxious and that her MMSE score was 19/30 and that she was "losing points in orientation, short term recall and copying of design" but she had become institutionalised and would need time to adjust.

[88] There is other medical evidence indicating degrees of dementia and one included a dementia MMSE score of 12/30.

[89] Of course a Court does not have any evidence regarding the relevance of much of this material but there is no doubt it may have importance.

[90] In this frame of matters the mention of issues is not constrained by reference to the execution of a Will but because there had been consultations and reports obtained beforehand. That may if proved, provide the foundation of a relationship of trust and confidence involving Wilson McKay because Ms Paul was involved in

many matters affecting Mrs Sandman until Mrs Sandman put her signature on the Will.

[91] Wilson McKay's position is there is no evidence to support claims of a trust or breach of that trust. Nevertheless there is significant evidence that may assume some importance because there is a dispute about facts which may be significant in the determination of claims of responsibilities. And, throughout Vicki was always present and that provides Mr Sandman's foundation of concerns of undue influence. Wilson McKay had knowledge of Mr Sandman's interests by the 2005 Will by which Mr Sandman was to receive the whole estate if Vicki predeceased her mother. It appears Vicki was acting in the capacity of an attorney well before the execution of the December 2010 Will.

[92] There is some evidence indicating Ms Paul received instructions for Will changes from Mr Giboney and that acting on those instructions Ms Paul then wrote directly to Mrs Sandman regarding changes to be made. When the Will was signed it appears Vicki was present.

[93] It is argued that the controlling relationship of both Vicki and Mr Giboney was triggered by Mrs Sandman's ailing health. Mr Dillon submits a situation akin to a constructive trust arose and in the outcome a new Will provided for Vicki and, in contemplation of pre-decession, something to Mr Giboney.

[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.

[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.

[96] Perhaps claims of dishonest assistance can involve a third party to a trust or fiduciary relationship for which that third party may be held personally liable as if that third party was the constructive trustee or if he/she dishonestly assists in the perpetration of a breach whereby a loss is suffered to a beneficiary.

[97] Submissions on behalf of Wilson McKay focus upon a claim that a breach of trust could only arise on the vesting date created by the Trust i.e. the Will which clearly did not take effect until Mrs Sandman's death. Mr Sandman's issues focus upon testamentary capacity and claims of persons close to Mrs Sandman procuring changes in her Will. Thereby it is pleaded for Mr Sandman that a breach of trust has occurred and that Wilson McKay assumes liability as an accessory because of the assistance they provided in that process.

[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.

[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.

[100] Wilfully shutting one's eyes to the obvious or recklessly failing to make appropriate enquiries could amount to dishonest assistance.

[101] *Schmidt*⁵ 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.

Ruling

[102] The applications for strike out and summary judgment are dismissed.

[103] Costs are payable by the second defendants on a 2B basis.

Security for costs

[104] This application on behalf of Wilson McKay is premised upon claims that Mr Sandman will be unable to pay costs if his proceeding is unsuccessful.

[105] Relevant principles are well known. The Court's purpose is to balance interests and to ensure a plaintiff is not unnecessarily prevented from pursuing a claim by a requirement to pay security. Mr Hunt has calculated trial costs in the region of \$54,000 plus disbursements. In the Court's view that is a modest estimate.

[106] It is clear from the Court's assessment regarding the strike out/summary judgment applications that Mr Sandman's case is not without the prospect of some success.

[107] Therefore, the Court should make an order for security only if satisfied Mr Sandman would be unable to pay costs if unsuccessful. The Court's impression is that Mr Sandman will have issues in meeting any adverse costs payment if unsuccessful.

⁵ *Schmidt v Pepper New Zealand (Custodians) Ltd* [2012] NZCA 565 at paras 15 and 16.

[108] Mr Sandman has not provided any evidence at all by reference to the statutory declaration executed in 2010 by Mrs Sandman wherein she stated that she had supported Mr Sandman “for the last twenty (20) years by providing him with rent accommodation, giving him a weekly allowance and paying all out of pocket expenses including medical and dental expenses, while he attempted to establish himself as an artist”.

[109] Mr Sandman is aware of the reasons why the Court could accept that he was unable to meet costs. Until Mrs Sandman died Mr Sandman lived in her apartment rent free and only upon his mother’s death did he acquire ownership of that property. Recent evidence indicates he has obtained substantial funding secured over his property the value of which is by current values is somewhat modest.

[110] The Court believes it can be inferred Mr Sandman may be unable to pay costs in the event his claim is unsuccessful.

[111] Although the Court agrees Mr Sandman’s claim should not be struck out and summary judgment should not be awarded, there should be no indication by those rulings regarding any prospects of success in the litigation outcome.

[112] The Court fixes security to be paid in the sum of \$40,000 to be paid in two tranches of \$20,000.00, the first of those is to be paid into Court (and held on interest bearing account) before this matter progresses any further. The second tranche is to be paid on the close of pleadings date.

[113] Costs shall be awarded to Wilson McKay on the security for costs application on a 2B basis together with disbursements as fixed by the Registrar.

Associate Judge Christiansen