PAPER FOR THE EASTERN SUBURBS LAW SOCIETY

Joseph Thomas Reilly –v- Margaret Lilian Reilly and Others

Supreme Court of NSW – Case Number 2014/287702

THE FOLLOWING FACTS ETC ARE TO BE FOUND IN THE JUDGMENT OF LINDSAY J OF THE 20 OCTOBER, 2017

PARTIES

1. **Francis Bede Reilly** ("the Deceased") died on the 22nd December, 2012. The Deceased was married to Margaret Lillian Reilly ("Peg" or "the First Defendant"). Together they had the following children:-

    a. Joseph Thomas Reilly ("the Plaintiff" or "Joe");
    b. Margaret Frances McFee ("the Second Defendant" or "Margaret");
    c. Carmel Anne Farrell ("the Third Defendant" or "Carmel");
    d. Genevieve Claire Wallace ("the Fourth Defendant" or "Genevieve); and
    e. Patricia Gai Reilly ("the fifth Defendant" or "Tish").

HISTORY

2. Between the early 1960s and about August 2008, the Deceased and his wife were farmers and graziers near Forbes NSW. They farmed two (2) adjoining properties known as *'Malaya'* (324 hectares/801 acres) and *'Boronga'* (486 hectares/1,201 acres). The Deceased's wife, the First Defendant, mostly worked off-farm as a nurse at a retirement village in Parkes. she retained her earnings from her employment.

3. During their respective childhoods, the children would help the Deceased with some farming tasks from time-to-time. As the Reilly daughters finished their high-schooling, they moved away from the family farm to pursue careers elsewhere. They would return to the family farm from time-to-time for visits.

4. After he left school, the Plaintiff, (Joe) worked full-time on the family farm as a farmhand for about sixteen (16) months. He then commenced a university course in radiology, but he did not continue with this and undertook an apprenticeship as a plumber. From about 1986 to 1994 the Joe lived predominantly off the farm, returning when required to help the

deceased with farm work, for which Joe was not paid. At the same time, he gained trade qualifications as a plumber.

5. From 1995 to the present the Joe lived on *'Boronga'*. He did part-time plumbing work off-farm and worked part-time on the farm again without pay.

6. On 21 Jun, 2000 the First Defendant, (Peg) who was the registered proprietor of *'Malaya'*, transferred that property to the Plaintiff, Joe, in consideration of his labour on behalf of the Deceased's and the First Defendant's farming endeavours which had been unpaid to that date. On the Peg's instructions, her solicitor wrote to Joe on 10 April 2000 in the following words:

> *"The intergenerational stamp duty waiver would apply. You have been working on Malaya for many years, whilst not drawing any partnership shares/sharefarming nor labour fee you would still be entitled to the stamp duty waiver if you intend to continue farming and grazing use of Malaya."*

Thereafter, the Deceased and the First Defendant, Peg, continued to farm and graze their cattle on *'Malaya'* and *'Boronga'*. No payments were made to the Plaintiff, Joe, for the use of *'Malaya'* or for his subsequent contribution to the farming and grazing enterprise conducted by the Deceased and the First Defendant.

7. In March 2003, the Deceased consulted Mr Buckley, Solicitor, of Parkes. He instructed Mr Buckley to prepare a Will. Mr Buckley's handwritten contemporaneous notes read as follows:

> *"Francis Bede Reilly*
> *Boronga*
> *Farmer*
> *Peg has given her farm to Joe. You own 'Boronga' in your name only.*
> *Leave 'Boronga' to Joseph Thomas Reilly together with ⅔ of your interest in your farming P'Ship FB & ML Reilly.*
> *Residue to girls equally.*
> *Margaret Frances McFEE*
> *Carmel Anne FARRELL*
> *Patricia Gai CATTLE*
> *Genevieve Clare WALLACE*
> *Lengthy".*

8. Mr Buckley drew the Will for the Deceased, but erred in his drafting. The third clause read as follows:

> *"I GIVE DEVISE AND BEQUEATH the whole of my farming property known as "Boronga" Gunningbland together with my share of the stock and plant thereon."*

The third clause remained unfinished. The Deceased executed the will in that form. This resulted in a prior for rectification of the Deceased's will

9. The Deceased was born in 1924 and from about 2005 onwards he began to lose his physical and intellectual capacity. The Deceased was injured in a motor vehicle accident on the family farm in August 2008. He was hospitalised and then transferred to the Mater Nursing Home at Forbes, where he remained under fulltime nursing care for the remainder of his life.

10. In June 2009, the First Defendant, Peg, was one of the Deceased's appointed attorneys under a Power of Attorney given before the deceased lost capacity. The appointment s occurred prior to the Power of Attorney Act 2004 (NSW). The Plaintiff, Joe, was the other appointed attorney. Acting as attorney for the Deceased, the First Defendant, Peg, transferred *'Boronga'* to the four (4) daughters (the Second to the Fifth Defendants) as joint tenants. *'Boronga'*, which then had a market value of $815,000, was transferred to the Second to the Fifth Defendants for consideration of $1.00. The First Defendant's emphatic and repeated evidence was that the transfer of *'Boronga'* was not motivated by Centrelink concerns but, rather, by her own perception of fairness to all of her children.

11. On 30 June, 2009 at the instigation of the First Defendant, Peg, a Partnership Agreement was made between each of her five (5) children (the Plaintiff, Joe, and the Second to the Fifth Defendants). This partnership between the Plaintiff and the Second to the Fifth Defendants was known as *'The Shadrack Partnership'*. The assets of the *FB & ML Reilly Partnership*, the Deceased's and the First Defendant's farming and grazing partnership business which had continued upon *'Malaya'* (owned by the Plaintiff) and *'Boronga'* (then owned by the Deceased), were transferred to the *Shadrack Partnership* for no consideration. Between 1 July, 2000 and 30 June, 2009 the *FB & ML Reilly Partnership* the Plaintiff received no payment for his management of the partnership business before the assets were transferred into the *Shadrack Partnership*.

12. Most of the *Shadrack Partnership* profits remained undistributed at that time. Peg's Solicitors' file notes indicate that the First Defendant. Peg, had reserved for herself and the Deceased a right to draw on the *Shadrack Partnership* profits, because those profits were initially assets of the *FB & ML Reilly Partnership*.

13. A second partnership was entered into by the Second to the Fifth Defendants, (the daughters) with respect to the joint ownership of *'Boronga'*. This was known as *'The Boronga Partnership'*. There was no evidence that this entity carried on business at any material time.

14. The Deceased died at the Mater Nursing Home at Forbes on 22 December, 2012, aged 88 years. The First Defendant, Peg, was the Executor appointed in the (deficient) Will of the Deceased which Mr Buckley, Solicitor, had drafted in 2003. The First Defendant, Peg, took no steps to apply for a Grant of Probate of the Will, or seek its rectification. She took the view that *'Boronga'* was not an asset of the Estate. She purported to divide the Deceased's cashable assets equally between the five (5) children, making no attempt to deal with *'Boronga'* or with the Deceased's interest in the cash assets, livestock and farm plant which had been transferred into the *Shadrack Partnership* on 30 June, 2009 from the *FB & ML Reilly Partnership* without consideration.

15. The market value of *'Boronga'* was $815,000 at the time of transfer (2 December, 2009) and was thought to be in the range of $1-$1.2 million at time of trial.

16. At the time of trial the assets of the Shadrack Partnership consisted of:
    (a) Cash bank deposits of approximately $300,000.00;
    (b) Cattle worth about $230,000 in the current market; and
    (c) Farm plant and equipment valued at about $63,000.

17. The *Shadrack Partnership* had not paid anything to the Plaintiff, Joe, since 1 July, 2009 for his management of the Partnership business conducted on *'Boronga'/'Malaya'*. Joe claimed 30 hours per week x $25.00 per hour x 6 years, the Partnership would owe the Plaintiff about $240,000 for his labour.

18. The *Shadrack Partnership* had not paid the Plaintiff, Joe, any amount for its use of the property *'Malaya'* since 1 July 2009. At $30.00 per acre per annum, a notional rental wass estimated at $164,000.

19. There were Westpac Term Deposits of about $300,000 held in the joint names of the Plaintiff and the Second to Fifth Defendants. The source of those funds was the *FB & ML Reilly Partnership* and, later, the *Shadrack Partnership.*

20. According to the file notes of the Solicitor for the First Defendant, Peg, had assets of about $1 million. The notes indicate that she had made a Will in which her entire Estate would pass to her four (4) daughters in equal shares. Notwithstanding that, the First Defendant told the Court in her evidence that she has now made a Will leaving her entire Estate to her grandchildren, effectively excluding the Plaintiff, Joe, he being the only child without issue.

SIXTH DEFENDANT PEG'S SOLICITORS

21. In 2009, the First Defendant, Peg, consulted a junior solicitor employed by Peg's Solicitors. She sought advice as to matters of *'Estate Planning'*. The solicitor's files indicate that the *'Estate'* in question was the Deceased's Estate.

22. The First Defendant, Peg, retained the Solicitors (Mr Maccallum) to:

    (a) Advise on a way of limiting the Deceased's exposure to the payment of fulltime nursing fees of about $1,000 per week at the Mater Nursing Home;

    (b) Register the Enduring Power of Attorney which the Deceased had given jointly and severally to First Defendant, Peg, and the Plaintiff, Joe, before the Deceased lost his capacity;

    (c) Transfer *'Boronga'* to the Second to the Fifth Defendants, the daughters;

    (d) Form the *Boronga Partnership*;

    (e) Form the *Shadrack Partnership*;

    (f) Transfer to the *Shadrack Partnership* the assets of the Deceased's and the First Defendant's partnership known as *FB & ML Reilly Partnership*; and

    (g) Advise generally.

23. In 2009, after initial consultations with the First Defendant, Peg's solicitor took most of his instructions from Patricia Gai Reilly (the Fifth Defendant, one of the daughters). The evidence of the Fifth Defendant was that she was merely a conduit, passing on her mother's

instructions to Mr Maccallum. She was, she said, merely, *"my mother's arms and legs"*. For example, she had an email facility, whereas her mother, Peg, did not.

24. In 2009, Peg's solicitor uplifted the Power of Attorney and the Deceased's 2003 Will from Mr Buckley, Solicitor. Peg's solicitor read the will. He saw that there was a problem in clause 3 of the will. He considered that the will was "irrelevant" to the instructions he had received from the First and Fifth Defendants, Peg and her daughter. In cross examination Peg's solicitor acknowledged that he had read the Deceased's 2003 Will. He had noted that Clause 3 of the Will was incomplete. He acknowledged that a pencil note had been made on the Will to the effect that the unidentified beneficiary of *'Boronga'* and the partnership interests referred to in Clause 3, was the Plaintiff, Joseph Thomas Reilly. It was not clear who the author of the pencil note was, or how he or she had come to that conclusion. However, that was an important acknowledgment.

25. On 6 July 2009, Peg's solicitor registered the Power of Attorney at the Land Titles Office without notice to the Plaintiff, Joe, and without his consent.

26. In July 2009, Peg's solicitor prepared a Deed establishing the *'Shadrack Partnership'*. The Second to the Fifth Defendants executed that document. The First Defendant, Peg, then induced the Plaintiff to sign the agreement, representing to him that it was *'something to do with Frank's [the deceased] affairs'*.

27. In July 2009, Peg's solicitor also prepared a Partnership Deed known as the *'Boronga Partnership'* between the Second to the Fifth Defendants. No notice of this was given to the Plaintiff, Joe.

28. In late 2009, Mr Maccallum, acting for the *'vendor' "Francis Bede Reilly"* the Deceased and the *'purchaser'*, and without notice to the Plaintiff, sold *'Boronga'* to the Second to the Fifth Defendants. Then, by transfer dated 1 July 2009, transferred *'Boronga'* to the Second to the Fifth Defendants as joint tenants for the consideration of $1-00. Each of the Second to Fifth Defendants has a right to alienate a quarter share of the title to herself, but has not done so.

29. On 13 August 2009 the Transfer was stamped by the Office of State Revenue as "*Section 274- No duty payable*". There was an inconsistency in solicitor's claim that he was acting at all times on behalf of the First Defendant when, on the contract for sale, he asserted that he was acting on behalf of the Deceased.

FIDUCIARY DUTY

30. As Attorney for the Deceased, the First Defendant's fiduciary duty was to deal with the Deceased's assets only for his use and benefit. Her Attorneyship did not carry with it the licence to transfer the beneficial ownership of *'Boronga'* to the Second to the Fifth Defendants for a nominal consideration, or the Deceased's partnership interest in the *"FB & ML Reilly Partnership"* to the *Shadrack Partnership* without any consideration. She was not empowered to '*square the ledger'* by transferring *'Boronga'* to her daughters to achieve her own perception of a fair distribution of the Deceased's assets.

31. On the Deceased's death, Peg's solicitor took instructions from the First Defendant, Peg, as to the administration of the Deceased's Estate. The First Defendant did not seek a Grant of Probate of the Deceased's Last Will. The evidence was that Peg's solicitor did not turn his mind to:

    (a) the content of the Deceased's Last Will;
    (b) the deficiency in Clause 3 of the Will;
    (c) whether or not the Deceased held an equitable interest in *'Boronga'* at the time of his death; or
    (d) the question of rectification of the Will.

    Peg's solicitor retrieved the Deceased's shareholdings without obtaining a Grant of Probate, procured the sale of the shares and then attempted to distribute the cash Estate in accordance with the First Defendant's instructions, which did not accord with the trusts created by the Will.

32. Peg's solicitor drew a Deed of Family Arrangement between the First Defendant, Pge, the Plaintiff, Joe, and the Second to the Fifth Defendants, the daughters. The Deed purported to divide the Deceased's cashable assets between the Plaintiff and the Second to the Fifth Defendants in equal shares. The Plaintiff, Joe, refused to sign the Deed and sought independent legal advice. The Court proceedings then followed.

ISSUES

(i) **Rectification** of clause 3 of the Deceased's will of 26 March 2003 by adding immediately after the words *"...and plant thereon..."* the words *"...to Joseph Reilly.";*

(ii) **Grant of Letters of Administration** with the Deceased's will dated 26 March 2003, as rectified above, annexed;

(iii) **The breach of fiduciary duty** to the Deceased by the First Defendant in the transfer to the Second to the Fifth Defendants of the property known as *'Boronga'*;

(iv) **The breach of fiduciary duty** to the Deceased by the First Defendant in the transfer of the Deceased's interests in the *FB & ML Reilly Partnership* to the *"Shadrack Partnership*;

(v) **The knowing participation** by First Defendants Solicitors in the First Defendant's breaches of her fiduciary duty to the Deceased by the transfers of:

  (a) the property known as *'Boronga'* to the Second to Fifth Defendants for nominal consideration; and

  (b) the Deceased's interest in the *FB & ML Reilly Partnership* to the *Shadrack Partnership* for no consideration.

(vi) **Alternatively, the wilful blindness** of the First Defendants Solicitors to the First Defendant's breaches of her fiduciary duty to the Deceased by the transfers of:

  (a) the property known as *'Boronga'* to the Second to Fifth Defendants for nominal consideration; and

  (b) the Deceased's interest in the *FB & ML Reilly Partnership* to the *Shadrack Partnership* for no consideration.

(vii) Compensation from the *Shadrack Partnership* to the Plaintiff for the use of *'Malaya'*;

(viii) **Compensation** for the Plaintiff for his work for the *Shadrack Partnership.*

THE LAW

RECTIFICATION OF THE WILL

33. The path to rectification is relatively uncomplicated. The Court has power to rectify[1] "*to carry out the intentions of the Testator, if the Court is satisfied the Will does not carry out the Testator's intentions because:*

    (a) *A clerical error was made, or*

    (b) *The Will does not give effect to the Testator's instructions."*

34. On the evidence of Mr Buckley, the Solicitor who drew the deceased's Will, corroborated by his contemporaneous file notes, the Will did not give effect to the Testator's instructions.

ESTATE ADMINISTRATION

35. Should the Will be rectified, the trusts created by the Will must then be administered. Margaret Lilian Reilly, the Deceased's first choice as Executor, had effectively renounced her appointment by declining to seek a Grant of Probate. In circumstances where the Plaintiff will have the major interest in the due administration of the Estate, and where no-one else has volunteered to administer the estate or applied for administration with the Will annexed the Plaintiff is the appropriate person to whom Letters of Administration with the rectified will annexed should be granted.

RETURN OF *'BORONGA'* TO THE DECEASED'S ESTATE

36. There are three threshold (3) questions to be answered with respect to the disposal of *'Boronga'* and the Deceased's interest in the FB & ML Reilly Partnership.

    (a) **Firstly**, was the First Defendant empowered by the Power of Attorney to transfer those assets at all?

    (b) **Secondly**, if there was such a power, was it exercised by the First Defendant in breach of her fiduciary duty?

    (c) **Thirdly,** was there, in truth, a disposition of the Deceased's beneficial interest in the *FB & ML Reilly Partnership* assets at all?

The boundaries of the Attorneys' powers

37. The Power of Attorney[2] was given by the Deceased pursuant to the (now repealed) provisions of the *Conveyancing Act, 1919*. The instrument itself contained no power for the

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[1] S.27 *Succession Act, 2006*

attorney to confer benefits upon herself. The standard clause in the instrument permitting self benefit was crossed out. The statute itself[3] expressly excluded the power to 'self benefit'. Section 163B(2) provided:

> *'The authority conferred by an instrument... (a Power of Attorney)...does not include:*
>
> ...
>
> *(b) unless it is expressly conferred by the instrument – authority to execute an assurance or other documents or do any other act, as a result of which a benefit would be conferred on the attorney appointed by the instrument'*

38. The First Defendant's evidence was that she transferred *'Boronga'* and the Deceased's interests in the *FB & ML Reilly Partnership* to achieve her own ends, namely her concept of fairness between her children. Thus, the transfer of the assets conferred a non economic benefit upon her, namely the satisfaction of achieving her own design. It was a '*social benefit'* for the Attorney, which was not authorised.

39. The First Defendant's evidence was that she was primarily moved to achieve her own concept of fairness in the distribution of the marital assets. However, there was a secondary motive recorded throughout Mr Maccallum's file notes. This was the financial motive of ultimately reducing the burden upon the First Defendant of the cost of the Deceased's nursing home care. The First Defendant's evidence[4] was that she (not the Deceased) was meeting the cost of care when she transferred his assets. Her solicitor's evidence confirmed the First Defendant sought to divest the Deceased of his assets so that he would be entitled to pensioner benefits after a period of five (5) years. Whilst this secondary motive was communicated by the Fifth Defendant, Patricia Reilly, there is no doubt on the evidence that she was merely a conduit, or the *"arms and legs"* passing on her mother's instructions to the solicitor.

40. If the First Defendant transferred *'Boronga'* for the primary or secondary purpose of relieving herself of the burden of the Deceased's nursing home care cost, then her actions were *ultra vires* as this was a benefit to her.

41. In so far as the '*Boronga*' transfer was concerned, there was another barrier to the First Defendant's exercise of the power. The Deceased executed his Power of Attorney on 7

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[3] S163B(2) Conveyancing Act, 1919.

June, 2000, in the presence of Mr Buckley, Solicitor. Mr Buckley certified on page 2 of the document '*I explained the effect of the General Power of Attorney on the preceding page to the Grantor of the General Power of Attorney before it was executed.*' Mr Buckley was not cross-examined on his certification. It was a fair inference that the Mr Buckley explained the provisions of S.163(2) Conveyancing Act, 1919, which rendered invalid an Instrument of transfer of land under the Power of Attorney, unless the same had been registered by the Registrar General.

42. What occurred after 1 July, 2009, when the First Defendant executed the 'Boronga' transfer, was that the First Defendant herself enlarged the power given to her on 7 June, 2000, by unilaterally procuring registration of the Deceased's Power of Attorney. The First Defendant gave to herself an additional power to transfer land.

43. The boundaries of the First Defendant's power were set by the Deceased. The Attorney was authorised to '*do on my behalf anything I may lawfully authorise an attorney to do*'. The source of the power or authority must always have been the Deceased. He could not delegate to the First Defendant a power to enlarge the scope of her agency. If the given power was that wide, the First Defendant could have authorised acts which had been expressly precluded by the Deceased.

44. Just as the Deceased expressly limited the powers to exclude self benefits, he also precluded the valid execution of instruments transferring land by declining to register his Power of Attorney. The later acts of the First Defendant in executing the *'Boronga'* transfer, procuring registration of the Power of Attorney and registering the *'Boronga*' transfer to achieve her own ends were all *ultra vires* acts.

Was the Power of Attorney exercised in breach of fiduciary duty?

45. The First Defendant claimed that she transferred '*Boronga*' to fulfil a part performed agreement made in the year 2000 with the Deceased and allegedly re-affirmed in 2003. There was no contemporaneous corroboration of that evidence. Indeed, when the property *'Malaya'* was transferred to the Plaintiff in the year 2000, the First Defendant's then solicitor, Mr Burke, wrote to the Plaintiff, Joe (and the First Defendant) identifying the motive for the *'Malaya'* transfer as being "*the many years of unpaid work that you (the*

Plaintiff) have done on the properties." The First Defendant agreed she did not correct her Solicitor's statement in that correspondence.

46. Further, the First Defendant's evidence was that in March 2003 the Deceased reaffirmed his agreement to bequeath *'Boronga'* to his daughters. However, the contemporaneous evidence was to the contrary. Mr Buckley's contemporaneous notes, made about one day later, record that *'Boronga'* should pass to the Plaintiff.

47. There was no outright prohibition on the acceptance of the First Defendant's uncorroborated evidence. However, all of the leading authorities require the Court to carefully scrutinise evidence of conversations had with a person now deceased. Once a person is deceased, it is well known that alleged conversations with the deceased are looked upon by the Court not *"with suspicion and as prima facie fraudulent, but is scrutinises the evidence very carefully to see whether it is true or untrue."* [5]

48. The transfer of 'Boronga' for $1.00 was in breach of the First Defendant's fiduciary duty. She was bound to exercise her attorneyship for the benefit of the Deceased. Divesting him of an asset worth $815,000 was an improvident act which caused a significant loss to the Deceased. The transfer did not serve his interests. It unjustly enriched his daughters, who did not pay for the asset.

THE LIABILITY OF THE FIRST DEFENDANT

49. If the First Defendant did have authority by the Power of Attorney, that does not excuse her from her fiduciary duty owed to the Deceased. She would be held liable for the loss to the Deceased's estate. As Brereton J said in *Ward v Ward* (No 2) NSWSC [2011] 1292 @ [4]:

> *"The relationship of principal and attorney under power of attorney is a recognised class of fiduciary relationship [Hospital Products Ltd v United States Surgical Corporation (1985) 156 CVLR at 68 (Gibbs CJ)]. Although the power of attorney under which the first defendant entered into the loan agreement was expressed to authorise the attorney 'to execute an assurance or other document,*

[5] Plunkett v Bull 19 CLR 544 @ 549: Hunt v Barlow Bryson J @ [4]: Moustach Pty Ltd v Takchi SC 2013/205000 Brereton J @ [29]

or do any other act whereby a benefit was conferred on him', that is a matter of authority, and does not exonerate the attorney from the fiduciary obligations by which an attorney under power is bound."

THE LIABILITY OF THE SECOND TO THE FIFTH DEFENDANTS

50. In *Simmons v New South Wales Trustee and Guardian*, Beazley P and Barrett JA, and Gleeson JA set out the principles of the first limb of *Barnes v Addy* as follows:

"*[86] In Farah at [112] the High Court defined the first limb of Barnes and v Addy in this way:*

'[86] Persons who receive trust property become chargeable if it is established that they have received it with notice of the trust.

[87] The High Court also accepted, in the absence of any argument to the contrary, that a claim under the first limb of Barnes v Addy may be made against not only the trustee who misapplies trust property, but also a fiduciary who deals with property in respect of which he or she owes fiduciary obligations , in breach of such obligations: Farah at [113].

[88] The elements of a claim under the first limb of Barnes and Addy may be taken to be:

(1) the existence of a trust, or a fiduciary duty with respect to the property (trust property);

(2) the misapplication of trust property by the trustee or fiduciary;

(3) the receipt of the trust property by a third party;

(4) knowledge by the third party, at the time he or she received the relevant property, that it was trust property and that it was being misapplied or, in the case of a breach by a fiduciary, that the trust property was transferred pursuant to a breach of fiduciary duty.

[89] The authorities which may be taken to establish element (4) above include: (authorities omitted)

[90] Although Farrah did not consider the categories of knowledge sufficient to attract liability under element (4) of the first limb of Barnes v Addy, it may be accepted that the knowledge required is:

(1) actual knowledge of the trust, or the existence of the fiduciary duty, and of the misapplication of trust property or transfer pursuant to a breach of fiduciary duty; or

(2) wilfully shutting one's eyes to those things; or

(3) abstaining in a calculated way from making such inquiries, as an honest and reasonable person would make, about the trust and the application of the trust property;

(4) knowledge of facts which to an honest and reasonable person would indicate the existence of the trust and the fact of the misapplication.

[91] The authorities which establish that the above categories of knowledge are sufficient include:" (authorities omitted)

51. In *Sheahan v Thompson* SC 2013/127413 Rein J, after setting out what the Court of Appeal said in Simmons, above, said at [141];

> *"A third party who has notice of (by means of any routes described in (90) in Simmons) is liable to disgorge trust property received by him but is also exposed to in personam liabilities; [253] and [254] of Grimaldi:*

His Honour then set out paragraphs [253] and [254] of *Grimaldi*.

52. The Second to the Fifth Defendants knew:

(a) that the First Defendant held a power of attorney for the Deceased;

(b) that the Deceased was mentally incompetent;

(c) that the land known as '*Boronga*' belonged to the Deceased;

(d) that the land was valued at $815,000;

(e) that the transfer was improvident;

(f) that the transfer was intended to reduce the value of the Deceased's asset base contrary to his best interests.

Such knowledge is set out in the schedule to these submissions and marked "A"

THE LIABILITY OF FIRST DEFENDANT'S SOLICIOR

53. In summary, the evidence against the First Defendant's solicitor was that he was a relatively inexperienced practitioner. He accepted instructions from the First Defendant and her daughter the Fifth Defendant in relation to the Deceased's affairs. He knew the Deceased was incapacitated due to his advanced age and possibly due to injury.

54. The solicitor got himself into a complex situation of conflicting interests. It seems that he did not put his mind to the true identity of his client. He accepted instructions from the First Defendant in relation to certain of her own personal affairs. He accepted a retainer to act for

the Deceased, on the instructions of the Deceased's attorney the First Defendant in relation to '*Boronga*' and in relation to the Deceased's interests in the *FB & ML Reilly Partnership*. He simultaneously accepted a retainer to act for each of the Second to Fifth Defendants in the transfer of *'Boronga'*. He failed to identify conflicting interests and did not put his mind to that issue.

55. The solicitor said that he was retained to '*act for the Reilly family*' in the matters of *'Boronga'*, the Deceased's partnership interest and issues of the Deceased's estate planning. He was plainly wrong about the extent to which the persons affected by the transactions agreed to, or even knew of, the proposed dealings. He had no instructions from the Plaintiff, Joe, at any time. He did not make contact with the Plaintiff about any of the matters. He spoke to the Plaintiff once when he took a phone call from the Plaintiff, who had been asked by a Stock and Station Agent to give the solicitor particulars of the acreage of '*Boronga*'.

56. On the instructions of the First and Fifth Defendants, solicitor drew and engrossed a contract for the sale of *'Boronga'* from the Deceased to the Second to Fifth Defendants. He recorded on that document his retainer to act for the Deceased as Vendor (by his Attorney) and for the four daughters (as purchasers). For stamp duty purposes, the solicitor procured a valuation of '*Boronga*' from a Stock and Station Agent who stated that the market value of the property was $815,000.

57. The solicitor called for the production of Frank Reilly's Will and his Power of Attorney, to facilitate the transfer of '*Boronga*'. Those documents were provided by Mr Buckley, Solicitor. The Will was perused by the first Defendant's solicitor. He knew that the will had a problem with clause 3, but considered the will to be irrelevant to what he intended to do, i.e. transfer Boronga on the First Defendant's instructions. At some time later he observed that clause 3 of the Will was incomplete. He knew by some means that the Plaintiff was the intended beneficiary of clause 3 as someone had wrote the Plaintiff's name on the document in pencil. This pencilling had now been removed.

58. The solicitor considered that the incomplete clause 3 of the Will was irrelevant to his tasks [6]. He caused the Will to be filed in the safe. He registered the Power of Attorney with the Land Titles Office, to facilitate the recording of the transfer of '*Boronga*'. He then assisted

the deceased's Attorney and the deceased's four daughters to sign the Contract and Instrument of Transfer, recording deceased's transfer of '*Boronga*' to his clients the Reilly daughters for the consideration of $1.00. On 2 December, 2009, the solicitor procured the Land Titles Office to record on the Real Property Act Register the transfer of '*Boronga*' to the four Reilly daughters.

59. The solicitor assumed Peg had a valid power to transfer 'Boronga' for $1.00 and to transfer Frank's partnership interest for no consideration to the 'Shadrack' partnership. He did not seriously put his mind to the First Defendant's fiduciary obligations.

BREACH OF DUTY OF CARE

60. The conduct by the solicitor was negligent in that it owed a duty of care to the Plaintiff and acted in breach of that duty.

61. The Plaintiff was not a party to the retainer of the Sixth Defendant. Therefore, the duty owed to him was a duty of care of the type envisaged by the High Court of Australia in cases such as Hill v Van Erp [7] and Perre v Apand [8].

62. There are certain prerequisites to the imposition of a duty of care to a non party, where loss is said to have arisen out of a professional retainer agreement:

    (a) **Firstly**, the loss complained of must be reasonably foreseeable;

    (b) **Secondly**, the imposition of a duty of care must not impose an indeterminate liability on the professional service provider;

    (c) **Thirdly**, the duty must not impose an unreasonable burden on the autonomy of the wrongdoer;

    (d) **Fourthly**, the injured party must have been vulnerable to loss by the offending conduct; and

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[7] Hill v Van Erp 188 CLR 159
[8] Perre v Apand 198 CLR 180

(e) **Fifthly** the wrongdoer must have known that its conduct could cause harm to persons such as the person injured[9].

63. In the recent High Court judgment in Badenach v Calvert [10], the Court clarified the way in which Hill v Van Erp should be applied. At [20] the plurality referred to the Solicitor's duty to his client. Their Honours said '*That duty cannot be compromised by a duty to a person whose interests are not coincident with those of the client, but in the case of a testator and an intended beneficiary under the testator's will the interests are coincident'*. In the present case, it was claimed by the Sixth Defendant solicitor that his duty to his clients was not coincident with any duty that he may have owed to the Plaintiff.

JUDGMENT

64. His Honour gave judgment on the 20 October, 2017. His Honours Orders are to be found at paragraph 409.

FINDINGS

65. The Plaintiff succeeded against the First Defendant. (Paragraphs 131 et seq.)
66. The Plaintiff succeeded against the Second to the Fifth Defendants. (Paragraphs 230.)
67. The Plaintiff succeeded against the solicitor in that the solicitor breach a duty of care owed to the plaintiff. (Paragraphs 384 et seq.)

APPEAL

68. The Second to the Fifth Defendants and the Sixth Defendant have appealed.
69. The First Defendant has not appealed.

Dated: 16 March, 2018.

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Alun L Hill

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[9] McHugh J. Perre v Apand 198 CLR 180 at [133].
[10] Badenach v Calvert [2016] HCA 11 May, 2016