IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL AND EQUITY DIVISION

Not Restricted

No. S CI 2010 01664

IN THE MATTER of the Will and Estate of JOHN SZMULEWICZ, deceased
- and –
IN THE MATTER of Order 54 of the *Supreme Court (General Civil Procedure) Rules 2005*

DAVID SZMULEWICZ AND OTHERS	Plaintiffs
v	
SAM RECHT AND MICHAEL ZYLBERMAN (who are sued personally and as the Executors of the Estate of JOHN SZMULEWICZ, deceased)	Defendants

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JUDGE:	HABERSBERGER J
WHERE HELD:	MELBOURNE
DATES OF HEARING:	15 and 16 June 2011
DATE OF JUDGMENT:	10 August 2011
CASE MAY BE CITED AS:	Szmulewicz v Recht
MEDIUM NEUTRAL CITATION:	[2011] VSC 368

WILLS – Clause in will entitling executors to charge, in addition to professional fees, commission equal to 3.5% of the gross capital value of the estate and 5% of the income received by the executors – One of the two executors was a solicitor who took instructions for the will and supervised its execution and whose partner drafted the will – Whether breach of fiduciary duty negated by informed consent – Issue not raised by residuary beneficiaries until after administration of estate completed – Whether doctrines of estoppel, laches and acquiescence applied – *Administration and Probate Act* 1958, s 65.

APPEARANCES:	Counsel	Solicitors
For the Plaintiffs	Mr S. Newton	Wills & Probate Victoria
For the First Defendant	Mr M. Goldblatt	Tisher Liner & Co
For the Second Defendant	Mr E. Nekvapil	Lewenberg & Lewenberg

HIS HONOUR:

1. Mr John Szmulewicz died on 2 April 2008. Probate of his will dated 22 January 2008 ("the deceased's last will") was granted to the executors named therein, the defendants Sam Recht and Michael Zylberman, on 8 July 2008. Mr Recht, a partner in the firm of Tisher Liner & Co, was Mr Szmulewicz's solicitor and Mr Zylberman, a partner in the firm of LZR Partners, was his accountant. The Inventory of Assets and Liabilities filed by the defendants in support of their application for a grant of probate valued the deceased's estate at $6,515,339.18.

2. Apart from two charitable bequests of $15,000 each, the deceased left the whole of his estate to be held in three equal testamentary trusts. As events have transpired, each of the deceased's children, the plaintiffs David Szmulewicz, Adam Szmulewicz and Leah Shatter, is the primary beneficiary of one of the testamentary trusts. The initial trustee of each testamentary trust is the primary beneficiary or a person (including a company) nominated by the primary beneficiary.

3. Clause 22 of the deceased's last will, which was prepared by Tisher Liner & Co, provided as follows:

> **Entitlement to Charge**
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> (a) Any trustee being a legal practitioner or accountant may act in a professional capacity and shall be entitled to charge and be paid all professional charges for any business or act done by him in a professional capacity in connection with my Will.
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> (b) In addition to 22(a) above if any of the named executors proves this my Will then, in addition to being paid for professional fees, he/they shall be entitled to retain from my estate commission equal to 3.5% of the gross capital value of my estate and an amount equal to 5% of the income received by my executor, such charges are to be for the provision of non legal and non accounting work and in connection with the Trusts established by my Will.

4. By an originating motion filed on 30 March 2010, and amended on 13 July 2010, the plaintiffs sought a declaration that the defendants held any benefit which they had received pursuant to clause 22(b) of the deceased's last will on trust for the residuary

beneficiaries of the deceased's estate on the ground that clause 22(b) was included in the will in circumstances where it would be inequitable for either of the defendants to rely upon the same.

5. The amended originating motion went on to state why that would be so, as follows:

> 1. The first defendant was the solicitor of the deceased and had acted for him for some years;
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> 2. The said will was prepared by the first defendant himself, alternatively, under his supervision, alternatively on his behalf, by a member or employee of the firm of which he was, and is, a member, namely Tisher, Liner & Co;
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> 3. A fiduciary relationship therefore existed between the deceased and first defendant at the time of the making of the will;
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> 4. Clause 22 of the will gave to the first defendant and the second defendant significant benefits, namely:
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>   a. pursuant to sub-clause (a), the right of both defendants to charge and be paid all professional charges for any business or act done by them in a professional capacity in connection with the will;
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>   b. pursuant to sub-clause (b), in addition to the said right to charge professional fees, an entitlement to receive 3.5% commission on capital and 5% commission on income, to which the first and second defendants were entitled irrespective of the extent of work performed, or pains and troubles incurred, by them in the administration of the estate;
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> 5. In the circumstances referred to in the preceding paragraphs the benefits received by the defendants pursuant to the will were received as the result of a breach by the first defendant of the fiduciary duties owed by him to the deceased.

6. This proceeding was not issued until after the administration of the estate of the deceased had been completed and the residuary estate had been distributed. By that time the defendants had rendered invoices for, and paid themselves, a total amount of $260,811.54, including GST, for commission and disbursements. This amount was made up of $130,320.56 to Tisher Liner & Co, and $130,490.98 to LZR Partners. Subsequently, the sum of $700 was refunded by the defendants to the plaintiffs to take account of the fact that the deceased's Jaguar motor vehicle sold for $20,000 less than the value included in the Inventory.

7. In addition, Tisher Liner & Co had been paid the sum of $21,218.95 for legal work for the estate and LZR Partners had been paid the sum of $275.00 for the preparation of the estate's 2008 tax return.

8. Dr David Szmulewicz, the only witness called by the plaintiffs, agreed in cross-examination that at no time prior to the commencement of this proceeding had he or his siblings queried or challenged the charging of commission by the defendants. He agreed that in a letter to the executors dated 20 August 2009 the plaintiffs had made calculations using the capital and income percentages stipulated in clause 22(b) of the deceased's last will. Dr Szmulewicz said that it was not until they consulted a solicitor, following receipt of the letter dated 3 September 2009 from Tisher Liner & Co in response to the plaintiffs' letter of 20 August 2009, that they understood that they could dispute the defendants' entitlement to commission under clause 22(b). This statement was not challenged and I accept it. Ironically, Dr Szmulewicz said that it was the charging of the legal fees of over $21,000 on top of the commission of over $260,000 that prompted the plaintiffs to seek legal advice rather than the other way round.

The Plaintiffs' Submissions

9. The plaintiffs' case was simple and straightforward. The deceased reposed trust and confidence in Mr Recht, his long standing solicitor. Mr Recht was therefore in a fiduciary position with respect to the wording of the will in circumstances where he both took instructions from the deceased about the contents of the will and handled the obtaining of the deceased's approval of its contents. As a fiduciary Mr Recht owed a duty not to put himself in a position of conflict between his duty as a fiduciary and his personal interest. Clause 22(b) gave a significant financial benefit to the defendants by, for example, awarding them commission higher than they might obtain under an application pursuant to s 65 of the *Administration and Probate Act* 1958 ("the Act"), which commission could be taken without any scrutiny and irrespective of the extent of the pains and trouble incurred by the executors in the administration of the estate. Therefore, the inclusion of clause 22(b) was a breach of Mr Recht's

fiduciary duty. It was submitted that the breach was not negated, because Mr Recht was unable to show that the clause giving the executors significant financial benefit was included with the informed consent of the deceased.

10. Mr Newton of counsel, who appeared for the plaintiffs, referred to and relied on the decision of Holland J in *In the Will of Shannon*[1]. In that case the deceased's executor, a solicitor, had drafted the will and included therein a clause which provided that the executor would be:

> entitled to charge and be paid all usual professional and other charges for work or business done or transacted by him or his firm in proving my Will or in execution of or in connection with the trusts hereof and shall be entitled to commission at the same rate as that applicable to the Public Trustee of New South Wales.

The Registrar in Probate had referred to the Court the question whether this clause, or some part thereof, ought to be omitted from the grant, on the ground that the clause or part thereof was void or ineffective as an attempt to oust the jurisdiction of the Court with respect to remuneration of executors, or on the ground that such a clause was improper for a draftsman to include in a will appointing himself executor, because, by including it, he put himself in a position of conflict of interest and duty. It was agreed by the parties that the words "and other" should be omitted before the word "charges".

11. His Honour rejected the submission that the above clause was contrary to public policy as an attempted ouster of the jurisdiction conferred upon the Court by the New South Wales equivalent of s 65.[2] He did not follow the decision in *Re Croser, deceased; Piper v Croser*,[3] where Zelling J had stated that it was "arguable" that a similar clause was "bad as an attempted ouster of the jurisdiction of the Court."[4]

12. Holland J also ruled that in the circumstances of this case there was no conflict of interest and duty on the part of the solicitor drawing the will. He commented on this

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1 [1977] 1 NSWLR 210.
2 The *Wills, Probate and Administration Act 1898*, s 86 (NSW).
3 (1973) 6 SASR 420.
4 (1973) 6 SASR 420, 423.

situation as follows:

> I was informed by counsel that a provision in the above terms was not uncommon in wills drawn by solicitors who had been requested by their clients to be their executors, and that frequently solicitors were not prepared to undertake the office of executor for a client, unless the will contained such or a similar provision. Thus it appears that the admissibility of such a clause to probate is a matter of some importance. One can understand a testator's desire to have his solicitor act as his executor. Frequently a trusted solicitor will have become familiar with his client's family, property and affairs and, because of this and his professional knowledge and experience, will appeal to the client as the most suitable person to administer his estate. One can also understand that a solicitor, being in professional practice and often with duties to partners, may be unwilling to commit his or his firm's time and expertise to the office of executor unless adequately remunerated.[5]

13. His Honour did not agree with the observation of Zelling J in *Croser* that there was a clear conflict of interest and duty, when the proposed executor was the testator's adviser as to the drawing of the will and that, therefore, such a clause "should certainly not appear in wills drawn in these circumstances, if ever at all".[6] Rather, his Honour said:

> I do agree that the relationship of adviser and testator to which the learned judge refers is one of potential conflict of interest and duty, but the evil in it disappears if the testator is fully informed as to the effect of the proposed clause and consents to it.[7]

14 Holland J then went on to make a number of important comments concerning the role of the solicitor in this situation:

> References have been made in the past to the duty of a solicitor to his client, when including in a will provision for the solicitor to receive as executor remuneration over and above that which would be usually allowed to an executor for work that could properly be done without the employment of a solicitor: *Re Chapple*,[8] per Kay J; *Re Smith (deceased)*,[9] per Street J. Both learned judges firmly expressed the view that such a provision should not be included, unless the testator expressly instructed the solicitor to insert the very words used in the provision. I would go further and say that, in order that the testator should understand fully the effect upon his estate of the words proposed to be inserted, it is the duty of the solicitor or other advising draftsman to spell out to the testator the operation of such a provision so as to draw his attention to the fact that his estate would, or might, thereby be

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5 [1977] 1 NSWLR 210, 212.
6 (1973) 6 SASR 420, 423.
7 [1977] 1 NSWLR 210, 217.
8 (1884) 27 Ch D 584, 587.
9 (1916) 16 SR (NSW) 422, 425.

> charged more for administration than if he appointed a lay executor or left it to the Court to fix the remuneration. That was done in the present case, so that no objection on the ground of conflict of interest and duty can be taken to the clause here in question.
>
> In my opinion, it is not possible to say that such clauses are generally bad and inadmissible to probate because of conflict of interest and duty. To do so would be to make the presumption that the duty fully to advise the testator and to ensure that he understood and approved the clause would not have been performed. I appreciate the difficulty confronting beneficiaries in satisfying themselves or obtaining evidence that the duty had been performed, but, in my opinion, if proof of the performance of the duty is to become a prerequisite to the admissibility of such clauses to probate, that is a matter for the legislature, as it would be a radical departure from established practice and principle in the obtaining of probate of wills to require such proof before grant. I do not think it is for the Court to introduce such a rule for policy considerations, and certainly not upon an assumption that solicitors generally cannot be relied upon to do their duty to their testator clients.
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> In relation to the duty of the solicitor/executor to inform his client as to the effect of a proposed executor's remuneration clause, I should record that at present the rates of commission applicable to the Public Trustee are 4 per cent on the first $100,000 of capital, with a reducing scale of percentages thereafter, and 5¼ per cent upon income, as compared with 2 per cent on capital and 4 per cent on income generally allowed by the Court in the ordinary case. In my opinion, this difference in rates ought to be specifically drawn to the attention of testators by solicitors proposing a commission clause of the present kind.[10]

His Honour therefore answered both questions in the negative and directed that the will be admitted to probate.

15. As far as the second defendant was concerned, Mr Newton submitted that, even though Mr Zylberman may not have been involved in the preparation of the will, the benefit to him was also liable to be set aside because the fiduciary could not use his position to serve an interest other than the beneficiary's, be it the interest of the fiduciary himself or that of a third party.[11]

<u>The First Defendant's Submissions</u>

16. The first defence advanced on behalf of Mr Recht was that it was incumbent on the plaintiffs to allege a breach of the fiduciary duty, admittedly owed by Mr Recht to the

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10 [1977] 1 NSWLR 210, 217-218.

11 See P.D. Finn: "The Fiduciary Principle" in Youdan (ed): "Equity, Fiduciaries and Trustees", p 27. See also *Ex parte Bennett* [1805] 10 Ves 380, 400 (Lord Eldon LC); *Haywood v Roadknight* [1927] VLR 512, 517 (Dixon AJ).

deceased, for any viable cause of action against the defendants to arise and that the plaintiffs had failed to plead any material facts of the alleged breach. Therefore, Mr Recht was not required to answer the allegations made against him of breach of fiduciary duty. Mr Goldblatt of counsel, who appeared for the first defendant, submitted that Mr Recht should not be in a position where he needed to guess what the alleged breach was. He pointed out that the plaintiffs did not allege any "discernable breach" of the fiduciary duty such as an alleged misrepresentation, alleged non-disclosure of material facts, a failure to disclose the solicitor's personal interest or an allegation of undue influence.

17. Mr Goldblatt further submitted that as clauses such as clause 22(b) were not uncommon or unusual where professionals such as solicitors and accountants have been appointed, this was not a case where it might be said that the nature of the transaction itself suggested some conflict between the interests of the deceased and the personal interests of the solicitor. It was submitted that it would be an absurd result if the mere fact of the inclusion in a will prepared by the deceased's solicitor of a clause fixing the commission of executors, particularly where those executors were the deceased's long standing solicitor and accountant, would, without anything more, render the clause invalid.

18. This argument was, in effect, a repeat of the argument made in support of the applications by the defendants for summary dismissal of the plaintiffs' claim. Those applications followed the delivery of the amended originating motion which had been ordered in lieu of an order for pleadings. They were dismissed by Mukhtar AsJ in a reserved judgment delivered on 6 October 2010.[12] In paragraphs 16 to 20 of his judgment, his Honour stated the way in which the plaintiffs put their case. It was no different to the way in which it was put before me. Mukhtar AsJ rejected the defendants' submission that the proceeding did not disclose a cause of action because the motion and the supporting evidence did not demonstrate in what respects the defendants had breached their fiduciary duty. There was no appeal by either

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12 [2010] VSC 447.

defendant from this judgment.

19. Mr Goldblatt submitted that in the context of a claim arising out of a fiduciary relationship, there were three matters which had to be established, first, the fiduciary duty, secondly, a breach of that duty, and, thirdly, the appropriate relief. He submitted that the decision of the High Court of Australia in *Maguire v Makaronis*[13] supported his submission that the plaintiffs had failed to allege any material facts of the alleged breach. He referred to the following passages from the joint judgment of Brennan CJ, Gaudron, McHugh and Gummow JJ:

> Nevertheless, even here, to say that the appellants stood as fiduciaries to the respondents calls for the ascertainment of the particular obligations owed to the respondents and consideration of what acts and omissions amounted to failure to discharge those obligations.[14]

and:

> Thirdly, in the circumstances disclosed above, if the appellants were to escape the stigma of an adverse finding of beach of fiduciary duty, with consequent remedies, it was for them to show, by way of defence, informed consent by the respondents to the appellants' acting, in relation to the Mortgage, with a divided loyalty. What is required for a fully informed consent is a question of fact in all the circumstances of each case and there is no precise formula which will determine in all cases if fully informed consent has been given. …
>
> However, it should be noted that, contrary to what appeared to be suggested by the respondents in argument, there was no duty as such on the appellants to obtain an informed consent from the respondents. Rather, the existence of an informed consent would have gone to negate what otherwise was a breach of duty.[15]

20. In my opinion, there are other parts of the joint judgment which are relevant:

> In the present case, the trial judge found that there had been a conflict between the duty of the appellants to the respondents and their personal interests in the transaction, in particular as mortgagee under the Mortgage. The conflict meant that the loyalty of the appellants to their clients had not remained undivided, with the result that they could not properly discharge their duties to their clients.[16]

and:

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13 (1997) 188 CLR 449.
14 (1997) 188 CLR 449, 464.
15 (1997) 188 CLR 449, 466-467.
16 (1997) 188 CLR 449, 465.

> The fiduciary duty forbade, in the circumstances of the case, entry by the appellants into the transaction of which the giving of the Mortgage was a central part. There was no response by the appellants which showed, in the necessary sense, a fully informed consent. Subject to the need for restitution, the Mortgage was liable to be set aside at the suit of the respondents. The breach of the duty was patent at the creation of the very thing which is to be set aside.[17]

and:

> As indicated earlier in these reasons, their fiduciary duty forbade the appellants, in the circumstances of this case, to enter into the transaction and the equity for rescission was immediately generated by breach of that fiduciary duty.
>
> … The case is not put forward as one where there is an equity for rescission by reason of a misrepresentation by the defendant which was a cause of the plaintiff entering the transaction. The reliance is upon fiduciary duty, in breach of which the appellants took the Mortgage in their favour.[18]

21. Thus, just as the entry by the solicitors into the transaction with their clients in *Maguire* was a breach of their fiduciary duty because of the conflict between that duty and their personal interests, so was the preparation of the deceased's last will containing clause 22(b), unless the defendants could show that it was included with the informed consent of the deceased.

22. Furthermore, this is a case of a specific challenge to the executors' entitlement to rely on clause 22(b), not an objection to admitting the deceased's last will to probate based on a presumption that the duty fully to advise the testator and to ensure that he understood and accepted the clause had not been performed.[19]

23. Therefore, I reject the first defendant's submission that the plaintiffs' case fails for lack of a pleading of material facts of the alleged breach. In my opinion, the facts alleged in the amended originating motion and set out in paragraph 5 above were sufficient to require an answer from the defendants, whether that be that clause 22(b) was included in the will with the deceased's informed consent or some other answer.

24. Even if I am wrong in this conclusion, in my opinion, by the time of the trial, the

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17 (1997) 188 CLR 449, 467.

18 (1997) 188 CLR 449, 472.

19 See *In the Will of Shannon* [1977] 1 NSWLR 210, 218 (Holland J).

defendants were well aware of and should have understood the case that they had to meet, namely that clause 22(b), which gave the defendants significant benefits, had been included in the will without the informed consent of the deceased and that this was a breach of Mr Recht's fiduciary duty. I accept the point made by Mr Goldblatt about the vagueness and uncertainty resulting from the inclusion in Dr Szmulewicz's affidavit, sworn on 29 March 2010 in support of the originating motion, of allegations possibly going to the testamentary capacity of the deceased or to undue influence by Mr Recht. No doubt that was why Mukhtar AsJ ordered the filing of an amended originating motion, which raised no such issues, and why Mr Goldblatt successfully objected to the admissibility of certain passages in Dr Szmulewicz's affidavit, prior to its being relied on as his evidence in chief. Thus, in my opinion, any initial vagueness or uncertainty had been removed by the time of the hearing. The defendants knew the case they had to meet.

25. Further, in any event, it seems to me that the first defendant's first submission, which was in effect a no case submission, was overtaken by events. There was a preliminary discussion about this submission early in the hearing, when consideration was being given to adjourning the trial until there had been a hearing of the defendants' recently issued applications under s 65 of the Act for the allowance to them of "just and reasonable" commission for their "pains and trouble" in administering the deceased's estate. I refused to adjourn the hearing of the plaintiffs' application because, given the defendants' stance, it had to be heard at some stage. Why the defendants had not brought their s 65 applications earlier, so that all of the applications could have been heard at the same time, was not satisfactorily explained. Following the preliminary discussion, Mr Goldblatt changed course and sought leave to call viva voce evidence from Mr Recht. Leave was necessary because orders had previously been made for the filing of any affidavits on which the parties wished to rely and for the trial to proceed on the basis of those affidavits,[20] and no affidavit had been filed by Mr Recht.

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20 See the orders of Mukhtar AsJ made on 16 June 2010, 8 October 2010 and 10 December 2010. In the Other Matters part of the last order the following was stated:

> 2. Prior to today, the First Defendant had no intention to file any supporting

26. I reluctantly granted the application. During the hearing of that application, I indicated that I was not necessarily persuaded that the first defendant should now be allowed to change from the course he had previously deliberately adopted because the first defendant had "adopted a position" which was either good in law or not and it would be ruled upon in due course. However, in my ruling I held that as the evidence of Mr Recht was clearly essential to decide the critical issue in the case, namely did the deceased give informed consent to the inclusion of clause 22(b), and as its exclusion was likely to prejudice the defendants, in particular the second defendant, I would allow Mr Recht to give viva voce evidence so long as the plaintiffs' counsel was not prejudiced in his ability to cross-examine by that evidence not being an affidavit.

27. In my opinion, once Mr Recht gave evidence, this first defence was no longer apposite, although it was repeated in final submissions.

28. The second defence advanced on behalf of the first defendant was that the evidence did not disclose any breach of fiduciary duty. First, it was submitted that there could be no breach because no "benefit" was received by Mr Recht under clause 22(b). Mr Goldblatt argued that a gratuitous gift from a deceased to his or her solicitor was what was meant by a "benefit" rather than the granting to the executors of a fixed rate of commission for the work they would have to perform in administering the deceased's estate. He referred by way of example to the decision of the Queensland Court of Appeal in *Dore (as executor of the will of WHB Chenhall, deceased) v Billinghurst*,[21] dismissing an appeal against a grant of probate of the will of the deceased. Mr Dore, a solicitor, had drawn the testator's will under which he received a gift in the order of $1.3 million. He would have received about $20 million if the testator's wife had predeceased her husband.

29. However, whilst other examples of "benefits" might not be as substantial as the gift to

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affidavit. However, he now contends that by reason of the Court's order for discovery today (which opposed) [sic] he may need to do so.

21 [2006] QCA 494.

Mr Dore, it is clear, in my opinion, that a clause such as clause 22(b) does come within the scope of the principle that a fiduciary should not put himself in a position of conflict between his duty as a fiduciary and his personal interest, by including in a will prepared by him or on his behalf a "benefit" for himself. Holland J in *Shannon* treated the commission clause in that case as providing a "benefit" to the executor. It does not seem to me that it matters that an executor might be able to obtain an order from the Court allowing commission at the same or even higher rate or amount. The "benefit" to the executor is in not having his remuneration for the work performed by him reviewed by an independent body such as the Court.

30. As I have previously stated, the evidence of Mr Recht was essential on this critical issue. The following account is drawn from Mr Recht's oral evidence and from his file notes tendered in evidence. Mr Recht said that Mr Szmulewicz telephoned him in early January 2008 when Mr Recht was on holidays in Queensland to tell him that he was in the Epworth Hospital because "he had been suffering pain and discomfort in his stomach for some days" and that he wanted to ensure that his personal affairs were put in order in the event that something was to occur. Numerous other telephone conversations followed. In a telephone conversation on 7 January 2008, after Mr Recht had returned to work, Mr Szmulewicz told him that he would be undergoing an operation and that he wanted to make a new will before the surgery. Pending the operation, Mr Szmulewicz was moved from the Epworth Hospital to Sheridan Hall. Mr Recht said that he and Mr Zylberman visited Mr Szmulewicz there on 17 January 2008. They started going through Mr Szmulewicz's current will clause by clause. However, the taking of instructions was cut short. Whether this was because, as Mr Recht said in evidence, that he "didn't feel that Mr Szmulewicz was concentrating sufficiently" for him to continue with the meeting, or because, as stated in Mr Recht's file note of the meeting, Mr Szmulewicz asked that it be suspended because he was not feeling up to the task, probably does not matter.

31. Mr Recht said that he and Mr Zylberman saw Mr Szmulewicz again, late on the afternoon of 20 January 2008 at the Epworth Hospital. Mr Recht read through the

current will, one dated 21 April 2006, clause by clause. That will, which was also prepared by Tisher Liner & Co, named Mr Recht and Mr Zylberman as Mr Szmulewicz's executors. After providing for three legacies to charitable institutions, the deceased left the balance of his estate to his three children in equal shares. There was no equivalent to clause 22 of the deceased's last will in the 2006 will.

32. Mr Recht said that Mr Szmulewicz asked questions about the provisions of the 2006 will and gave instructions for a new will. He instructed that there was to be a change to the legacies left to charities. The Epworth Hospital was to be omitted and the gifts to Sholem Aleichem College and the Mental Health Foundation of Australia were to be increased to $15,000 each. Mr Recht said that Mr Szmulewicz then instructed that he did not want his son David included in his will and instead his one third share was to be left to David's eleven month old daughter Romi. Mr Szmulewicz explained why he was omitting David. Mr Recht also said that early in the discussions Mr Szmulewicz said that he wanted Mr Recht to be sure that he and Mr Zylberman were paid for the work that they do and he wanted Mr Recht to put something in the will to that effect. Mr Recht then read out the relevant part of his file note of this meeting. It read:

> Ensure that a clause is inserted for Sam Recht or Michael Zylberman to be paid for acting as trustee/executors.

33. Mr Recht gave evidence that on this occasion Mr Szmulewicz was alert and refreshed, having just had a shower. He said that Mr Szmulewicz was "fully cognisant of our discussions". He continued:

> He understood everything we were saying. As I have already demonstrated, I wouldn't have proceeded and continued with any discussion with him had I had any doubts that he didn't understand what we were doing or what we were saying and we were very careful to ensure that he understood what we were doing, what the process we were undertaking was.
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> Mr Szmulewicz understood at all times, he was lucid, he was firm, he knew exactly what he wanted to do, he changed legacies, he was absolutely certain about his position with his son and his instructions were very clear and precise. I had no issue about his capacity to give instructions.

34. Mr Recht said that on the next morning, 21 January 2008, he asked his partner, Mr Denis Liner, to prepare a will based on Mr Szmulewicz's instructions. Mr Recht said that Mr Liner was "more of a specialist in dealing with estates". Mr Recht said that he and Mr Liner discussed the instruction concerning commission for the executors. He said that Mr Liner advised him that "the usual rate" was five percent and that executors could receive five percent "under legislation". However, they agreed that five percent would be "too much" and decided that 3.5 percent would be "fairer" after weighing up what would be "fair and reasonable in the circumstances". It should be noted that Mr Recht's explanation as to how Mr Liner came to draft clause 22 in the way that he did, does not deal with the inclusion of a rate of five per cent on income.

35. That afternoon, Mr Recht attended on Mr Szmulewicz at the Epworth Hospital. They went into a "quiet room". Mr Recht said that he went through the changes that Mr Szmulewicz wanted in his will and "he accepted them". Mr Recht explained what had been done about removing David and putting in David's daughter. He read out the statement of reasons for excluding David which Mr Liner had prepared. Mr Recht was asked what his recollection was in relation to clause 22. He answered:

> It was no different to any of the other clauses, I went through each clause one by one and at the conclusion of each clause, "Do you understand, John? Do you understand this clause?" And he said yes. There was no further discussion about it. My understanding was that he understood that we had followed his instructions that he wanted us to be paid for the work that we did and he wanted a clause put in to that effect. We followed his instructions and he was happy with that.

36. The will was then signed by Mr Szmulewicz around 6.00 pm before a solicitor and articled clerk from Mr Recht's firm.

37. Mr Recht said that at about 9.30 pm that night he received a telephone call from Mr Szmulewicz, who said that David had come to see him, it was "an amicable meeting" and "he would like to reinstate him in the will if possible". The words in the quotation marks appeared in Mr Recht's file note of this telephone conversation on 21 January 2008. Mr Recht agreed to prepare an amended will. According to

another file note, Mr Szmulewicz called Mr Recht again the following morning when he was on his way to work. He again said that David had come to see him and he wanted David reinstated in his will. At about 10.00 am on 22 January 2008, before Mr Szmulewicz underwent his operation, Mr Recht took the amended will to the Epworth Hospital. He said that he went through the will with Mr Szmulewicz who "confirmed the contents of the will". The only change was that David was put back in the will in place of his daughter. Mr Recht said that Mr Szmulewicz "made no comment about the commission clause". Mr Szmulewicz then signed the will before another solicitor and the articled clerk from Mr Recht's firm.

38. One other part of Mr Recht's evidence should be mentioned. Rule 10.1 of the *Professional Conduct and Practice Rules* 2005 provided as follows:

> **10 Receiving a Benefit Under a Will or Other Instrument**
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> 10.1 A practitioner who receives instructions from a client to draw a will appointing the practitioner or an associate of the practitioner an executor must inform the client in writing before the client signs the will –
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> 10.1.1 of any entitlement of the practitioner, or the practitioner's firm or associate, to claim commission;
>
> 10.1.2 of the inclusion in the will of any provision entitling the practitioner, or the practitioner's firm or associate, to charge legal costs in relation to the administration of the estate, and;
>
> 10.1.3 if the practitioner or the practitioner's firm or associate has an entitlement to claim commission, that the person could appoint as executor a person who might make no claim for commission.

39. Given Mr Recht's evidence that Mr Szmulewicz asked for a clause to be inserted for Mr Recht and Mr Zylberman to be paid for acting as executors and trustees and that Mr Szmulewicz approved the inclusion of clause 22, it might be said that sub-paragraphs 10.1.1 and 10.1.2 had no application, or if they did apply, that their requirements were satisfied, apart from the requirement that the relevant advice be "in writing". However that may be, it is clear from Mr Recht's own evidence that the requirements of 10.1.3 were not met. Mr Goldblatt submitted that this sub-paragraph was inapplicable because it was clear from Dr Szmulewicz's and Mr Recht's evidence

about the deceased that he had no-one who could undertake the role of unpaid executor, given his lack of friends and his attitude towards his children. His solicitor and his accountant were prepared to act but only if they were paid. Of course, this last part of the submission does not fit easily with the fact that the deceased's 2006 will did not contain any clause providing for Mr Recht and Mr Zylberman to receive commission for acting as his executors. However, it seems to me that the point of rule 10.1 is that it is an attempt to ensure that a testator is given full information and advice by his solicitor about a clause in his will which potentially causes a conflict between the solicitor's fiduciary duty to his client and his personal interest. Mr Recht said in cross-examination that at the time of the signing of the will he was unaware of the existence of rule 10.1 Thus, knowledge of its requirements did not alert him to the need for him to think about the particular matters he should discuss with Mr Szmulewicz before allowing him to sign a will with clause 22(b) included.

40. Nevertheless, the decision in this case does not turn on whether or not Mr Recht complied with rule 10.1. As was stated by Brennan CJ, Gaudron, McHugh and Gummow JJ in *Maguire:*

> The trial judge, correctly, concluded that compliance with the requirements of the Solicitors' (Professional Conduct and Practice) Rules 1984 (Vict) would not necessarily satisfy the requirements of the fiduciary obligations of a solicitor to the client. Rule 10(2)(d) forbade a solicitor to act for both lender and borrower in connection with the loan of money unless and until the solicitor obtained written acknowledgment of the parties in or to the effect of Form 1.
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> …
>
> Rule 10(2)(d) states a prohibition upon a solicitor acting for lender and borrower and goes on to qualify that prohibition. It does not restate, and therefore does not qualify, the fiduciary obligation to avoid a conflicting engagement where it is the solicitor who lends money to the client.[22] [Footnote omitted]

41. As I understand the case advanced on behalf of the first defendant, it was submitted that the approach of the Queensland Court of Appeal in *Dore* meant that there was no need to inquire into informed consent so long as the testator knew and approved

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22 (1997) 188 CLR 449, 466. See also *Dore* [2006] QCA 494, [55] (McMurdo JA, with whom Holmes JA agreed).

clause 22(b). Attention was drawn to passages in the judgments which referred to "the requirement that a party who puts forward a document as being the last will of a deceased must establish that the testator knew and approved its contents at the time when the testator executed it,"[23] and to the conclusion that "the questions for the trial judge were whether the testator had testamentary capacity and he knew and approved of the contents of his will."[24]

42. Mr Goldblatt submitted that here such an approach would result in the plaintiffs' claim being dismissed because the evidence established that Mr Szmulewicz asked for a clause to be inserted providing for Mr Recht and Mr Zylberman to be paid for acting as executors and that Mr Szmulewicz approved and understood the wording of clause 22(b). This had to be seen in the context of Mr Szmulewicz signing a will in 2006 without such a clause and an earlier one in 2000 which contained a differently worded executor remuneration clause. So much may be accepted. But it is one thing to conclude that the testator in *Dore* knew of and approved the testamentary gift to his solicitor, it is another to conclude that Mr Szmulewicz understood all of the issues about clause 22(b) simply because he asked for a clause providing that his executors be paid and he read that clause in the will and said that he understood it. In any event, as *Maguire* makes clear, whatever approval or consent was given, it must be informed consent. That is, Mr Szmulewicz had to be informed of all the options open to him before he gave his consent.

43. What Mr Szmulewicz was not told was that:

(a) there was no automatic right for executors to receive commission so that he did not have to include a clause such as clause 22(b);

(b) in the absence of clause 22(b), the executors could still apply under s 65 of the Act and be allowed commission not exceeding five per cent "for [their] pains and trouble as is just and reasonable";

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23 [2006] QCA 494, [31] (Jerrard JA, with whom Holmes JA agreed).
24 [2006] QCA 494, [57] (McMurdo JA, with whom Holmes JA agreed).

(c) if clause 22(b) was included, then the executors would be entitled to receive 3.5 per cent of capital and 5 per cent of income irrespective of the amount of work performed by them in the administration of the estate and without any independent scrutiny, such as by the Court under s 65;

(d) if clause 22(b) was included, then the beneficiaries would not be able to challenge the level of the executors' remuneration or subject it to independent scrutiny, such as by the Court under s 65; and

(e) the rates included in clause 22(b) were those decided by Mr Recht and Mr Liner and were not fixed by law and could be reduced by him.

44. There was a marked contrast between the course followed by Mr Recht and that laid down by Holland J in *Shannon.* In my opinion, a solicitor putting forward a will for a client to sign, which contains a clause such as the one in this case, must explain to the client all of the pros and cons of the inclusion of the clause, even if it was the client who suggested the clause, so that it is clear that the client has given his or her *informed* consent to a clause which otherwise would give rise to an objection on the ground of conflict between fiduciary duty and personal interests. The solicitor cannot assume that the client understands all of the ramifications of including the suggested clause, no matter how sophisticated or astute the client may be with respect to financial matters.

45. Mr Goldblatt submitted on behalf of the first defendant that Mr Szmulewicz, by agreeing the level of commission with the defendants, fixed it a level lower than the maximum five per cent ceiling allowed by s 65 and thereby created certainty which was in everyone's interest. This, in turn, avoided the necessity for costly applications for commission to be made. Finally, it was submitted that the inclusion of clause 22(b) allowed the deceased "to lock in" the services of each of the defendants in acting as executors and administering his estate.

46. It seems to me that the first point this submission overlooks is that if Mr Szmulewicz

had been properly informed of his rights, he may have been able to gain certainty and "to lock in" the services of each of the defendants at a lower cost than that stipulated by Mr Liner and Mr Recht.

47. Secondly, if he had been fully informed, Mr Szmulewicz would have been able to decide for himself whether the possible benefits of leaving the executors to seek allowance of commission under s 65 of the Act were outweighed by the benefits of certainty and avoidance of costs. For myself, I do not agree that a sensible testator would necessarily consider that the certainty of a fixed rate was a desirable goal, given that it carried with it the risk that the executors could be either greatly over paid or under paid, depending on how much work had to be performed and the eventual size of the estate. I do not agree with Mr Goldblatt's submission that the deceased was in the best position to assess how much would need to be done. I would have thought that it would be difficult for a lawyer let alone a lay person to make an accurate prediction. Moreover, the certainty that was achieved was a bit one-sided in that the executors' commission could not be reduced regardless of the amount of work performed, but there was a slight possibility that it could be increased beyond that provided for in the deceased's last will, if there were exceptional circumstances shown, pursuant to the Court's discretion under s 65 of the Act.[25]

48. In my opinion, Mr Recht's evidence falls well short of establishing that Mr Szmulewicz gave informed consent to the inclusion of clause 22(b). As was said by the Full Court in *Haywood v Roadknight:*

> Where the relationship of confidence exists it is incumbent on the person in whom the confidence is reposed to satisfy the Court that he has put himself "at arm's length" to his client…He must furnish his employer with all the knowledge he himself possessed…and he must give "as ample and correct advice and information to his client as he would have done if his client had been dealing with a third person". [26] [References omitted]

49. I have, therefore, concluded that there was a breach of fiduciary duty by the first defendant, namely the conflict between his duty to the deceased and his personal

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25 *Re White; Tweedie v Attorney-General* (2003) 7 VR 219, [59]-[60[(Kellam J).

26 [1927] VLR 512, 521 (Cussen, McArthur and Lowe JJ).

interest resulting from the inclusion of clause 22(b) in the deceased's wills executed on 21 and 22 February 2008, and that the breach was not negated by the existence of informed consent.

50. The third defence advanced on behalf of the first defendant was that because of the delay by the plaintiffs in challenging the validity of clause 22 until after the estate had been fully administered by the defendants, by them paying each of the plaintiffs more than $2 million and by paying themselves their commission of over $260,000, the defendants had been prejudiced or suffered detriment. Mr Goldblatt submitted that one or more of the doctrines of estoppel, laches and acquiescence applied to prevent the plaintiffs succeeding in their attack on the validity of clause 22(b).

51. With respect to estoppel, Mr Goldblatt submitted that the plaintiffs' conduct, in allowing the defendants to administer the deceased's estate knowing full well that the defendants were relying upon clause 22(b) as a valid and enforceable entitlement to remuneration, amounted to a representation by silence that the plaintiffs accepted the validity of clause 22(b), and that the defendants relied upon and were induced to rely upon this representation in carrying out and continuing to carry out their duties as executors. Mr Goldblatt further submitted that the detriment suffered by the defendants was that had they, as professionals, been aware prior to or during the course of them acting as executors and administering the deceased's estate that the plaintiffs sought to contest the validity of clause 22(b), they would not have agreed to so act at all or unless another acceptable alternative arrangement had been negotiated.

52. There are at least three reasons why, in my opinion, the estoppel defence cannot succeed. First, I do not consider that there was any representation by silence when the plaintiffs did not know, until after the administration of the estate had been completed, that there was an argument that clause 22(b) might not be valid and that they could dispute the defendants' entitlement to commission under that clause. Without that knowledge, the plaintiffs cannot be regarded as having known or intended that the defendants act in reliance on an assumption induced by them that

clause 22(b) was valid and enforceable.[27]

53. Secondly, even if the above is incorrect, because the plaintiffs did not know about the potential breach of fiduciary duty, in including clause 22(b) in the deceased's last will without his informed consent until after the administration of the estate had been completed, there is nothing unconscionable in their subsequently disputing the validity of clause 22(b).[28]

54. Thirdly, in my opinion, the evidence does not establish that the defendants will suffer the alleged detriment if the assumption is not fulfilled. Mr Recht was asked in evidence in chief what he would have done if he had been told of a challenge to clause 22(b) prior to probate having been granted. He said that he would have discussed it with his partners, as his appointment as an executor and trustee was in his capacity as a partner of Tisher Liner & Co. Mr Recht said that he thought a meeting with the plaintiffs would probably have been suggested and that if they remained determined to challenge the clause:

> I don't believe I would have acted … But had they insisted on wanting to challenge the clause at that point in time, I dare say I may have very well not wanted to proceed to act knowing that I wouldn't be paid.

When I put to Mr Recht that this was not correct because s 65 of the Act gave him the right to seek to have an allowance of commission, he said that he did not know about s 65 at that time.[29] However, he agreed that in his suggested discussion with his partners, the existence of s 65 would have been mentioned and that in that case:

> Yes, I would have proceeded.

55. Mr Recht also said that he would not have undertaken the role of executor solely without Mr Zylberman's involvement because Mr Zylberman's intimate knowledge of Mr Szmulewicz's financial and tax affairs was "absolutely vital in the proper

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27 *Waltons Stores (Interstate) Ltd v Maher* (1987) 164 CLR 387, 428-429.

28 G Dal Pont and D Chalmers, *Equity and Trusts in Australia and New Zealand* (LBC Information Services, 1st ed, 1996), 215.

29 This evidence appears to be in conflict with his earlier evidence about his discussion with Mr Liner prior to the drafting of the will on 21 January 2008. See paragraph 34 above.

administration of this estate". It was submitted that the evidence showed that Mr Zylberman would not have agreed to act as executor if there had been no clause 22(b).

56. Counsel for the first defendant tendered an affidavit affirmed by Mr Zylberman on 23 November 2010, but there was no cross-examination of him. In that affidavit, Mr Zylberman said:

> Prior to his death I told John at a meeting with him and Sam Recht that my involvement as an Executor would be at a cost to the Estate. I believe that meeting took place at the nursing home John was staying a short period before his death. John acknowledged that he was aware there would be costs and agreed to that position.

57. I note in passing that this evidence suggests that it was Mr Zylberman who first mentioned remuneration of the executors and not the deceased as suggested by Mr Recht's file notes. However, that may be, Mr Zylberman later said in his affidavit:

> I accepted my role as Executor of the Estate on the basis of the Will and I have done all within my power to ensure that I honoured the Testator's wishes.

58. It is hardly surprising that Mr Zylberman relied on the existence of clause 22(b) in accepting his role as executor. But that is as far as his affidavit goes. There is simply no evidence that Mr Zylberman would not have agreed to act as the executor if his remuneration had been governed by s 65 of the Act instead of clause 22(b).

59. Thus, the suggested detriment, that the defendants would not have agreed to act as executors without the ability to be remunerated under clause 22(b), was not made out. Mr Recht's evidence was to the contrary and Mr Zylberman's evidence did not go that far.

60. I turn then to consider laches and acquiescence. A court may, in its discretion, refuse to grant equitable relief to a plaintiff in circumstances where that plaintiff comes to equity with undue delay. Undue delay can either take the form of laches or acquiescence. Both can be relied upon as defences to a breach of trust or to a breach of fiduciary duty.

61. The defence of acquiescence can be disposed of fairly quickly. As Deane J held in *Orr v Ford*:

> Strictly used, acquiescence indicates the contemporaneous and informed ("knowing") acceptance or standing by which is treated by equity as "assent" (i.e. consent) to what would otherwise be an infringement of rights[30].

His Honour further noted that acquiescence is used to signify:

> calculated (i.e. deliberate and informed) inaction or standing by which encouraged another reasonably to believe that his assertion of rights and consequent actions were accepted or not opposed[31].

62. Thus, in order to make out a defence of acquiescence, the following two elements must be established:

(a) there must have been a lapse of time; and

(b) there must be knowledge that rights have been infringed.

A plaintiff will not be expected to have sought redress if he or she was unaware that he or she had a claim. The prejudice suffered by the defendant must be the result of *knowing delay* on the part of the plaintiffs which has prejudiced the defendant and must not simply result from the passage of time.

63. As discussed above, the delay complained about by the defendants is in respect of the period during which they completed the administration of the estate. But this was not a knowing delay on the part of the plaintiffs. The only knowing delay by them was between when they were advised of their rights with respect to clause 22(b), which had to have occurred some time after 3 September 2009 and before 30 March 2010, when they commenced this proceeding. Not only is the period not very long, but also there was no prejudice suffered by the defendants during it. Therefore, the defence of acquiescence cannot succeed.

64. Unlike acquiescence, in order to raise successfully the defence of laches, there is no

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[30] (1989) 167 CLR 316, 337.

[31] (1989) 167 CLR 316, 340.

requirement of knowledge on the part of the plaintiffs. The rationale for the doctrine of laches was explained by Rich J in *Hourigan v Trustees Executors & Agency Company Limited* as follows:

> If a party in a position to claim an equitable right which is not undisputed lies by and acts in such a way as to lead to the belief that he has no such claim, or will not set it up, and thus encourages the party in possession to so deal with his own affairs that it would be unfair to him and to others claiming under him to tear up the transactions and go back to the position which might originally have obtained, the Court of equity will not, even where the claim is that an express trust is created, disregard the election of the party not to institute his claim and treat as unimportant the length of time during which he has slept upon his rights and induced the common assumption that he does not possess any[32].

65. More succinctly, Deane J, in *Orr v Ford*,[33] summarised the "ultimate test" for laches as:

> …whether the plaintiff has, by his inaction and standing by, placed the defendant or a third party in a situation in which it would be inequitable and unreasonable "to place him if the remedy were afterwards to be asserted".[34]

66. In the Supreme Court of South Australia Full Court decision in *Barker v The Duke Group Ltd (In Liq)*,[35] Perry J described the relevant principles as follows:

> The relevant principles in considering the defence of laches are clearly established. There must be unreasonable delay in the institution of the proceedings, and it must be established that by reason of the delay there has been such a substantial detriment to the defendant as to render it unjust to allow the claim to be prosecuted[36].

67. In this case, there was a period of nearly two years between the death of Mr Szmulewicz and the commencement of this proceeding. Even if the whole of this period is considered relevant, it is a quite short period when compared to periods of delay where the defence of laches has been successfully invoked. What is perhaps more important is what has occurred during the period of delay. In *Hourigan v Trustees Executors & Agency Company Limited*, for example, the plaintiff had failed to issue the writ until approximately fifteen years after his mother's death, thirty-seven

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32 (1934) 51 CLR 619, 629-630.

33 (1989) 167 CLR 316, 341.

34 *Lindsay Petroleum Co v Hurd*, LR 5 PC 221, 239-240.

35 [2005] SASC 81.

36 [2005] SASC 81, [142] (Duggan and White JJ relevantly agreed with Perry J).

years after the conveyance of the land in question to his mother and forty-two years after he had reached full age. The High Court held that the lapse of time and delay had materially affected the situation, had made a just ascertainment of rights impossible and had induced testamentary dispositions which it would be inequitable to disturb[37].

68. Here, by way of contrast, not only was the period of delay relatively short, there is, in my opinion, no irreparable prejudice to the defendants should the defence of laches be rejected. Although the commission paid by the executors to themselves will have to be repaid, they can seek a Court order that they be allowed "just and reasonable" commission. As previously stated, such applications have been belatedly commenced by each defendant.

69. Further, the plaintiffs, through their counsel, accept that, should there be, for whatever reason, a shortfall in the estate following the determination of the defendants' s 65 applications, they would have to repay sufficient of what had already been paid to them as residuary beneficiaries to meet that shortfall.

70. It is the absence of "considerable prejudice" to the defendants if the plaintiffs' claim for equitable relief is upheld which distinguishes this case from the authority relied on by Mr Goldblatt, namely *Websdale v S & J D Investments Pty Ltd*.[38]

71. Accordingly, in my opinion, the defence of laches should be rejected.

The Second Defendant's Submissions

72. Mr Nekvapil of counsel, who appeared for Mr Zylberman, did not dispute the plaintiffs' submission that a breach of fiduciary duty by the first defendant by preferring his own or a third party's interests affected both defendants. He said that the second defendant's principal interest was simply to be paid for the work he had done in administering the estate.

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37 (1934) 51 CLR 619, 651 (Dixon J).

38 (1991) 24 NSWLR 573, 582 (Clarke JA, with whom Samuels and Priestley JJA agreed).

73. However, Mr Nekvapil did submit that if the first defendant's submissions about estoppel, laches and acquiescence were successful then the same would apply to the second defendant, perhaps with even greater force, given that he had played no part in the inclusion of clause 22(b) in the deceased's last will and had, in good faith, gone about administering the estate and rendering services which the plaintiffs had accepted. For the reasons previously given, I do not consider that these doctrines prevent the plaintiffs from successfully challenging the inclusion of clause 22(b).

The First Defendant's Failure to Give Proper Discovery

74. I cannot conclude my reasons for judgment without saying something about the issue of discovery. On 10 December 2010, Mukhtar AsJ had ordered that:

> By 31 January 2011, the Defendant make discovery of any document recording or otherwise referring to the taking of instructions for preparation of, and execution of the deceased's will dated 22 January 2008.

75. By an affidavit of documents sworn by Mr Recht on 31 January 2011 only three handwritten file notes dated 21, 22 and 22 January 2008, a typed version of the first and third notes and a copy of the deceased's last will were produced. Mr Recht swore that apart from "the documents enumerated in Schedules 1 and 2" to his affidavit, he had not "ever had, in my … possession … any document relating to any question in the proceeding". As has been seen, the wording of the file note of a telephone conversation between the deceased and Mr Recht on the night of 21 January 2008 suggested that there had been preceding discussions, yet a letter from the plaintiffs' solicitors to the first defendant's solicitors dated 16 February 2011 noting the limited extent of the discovery went unanswered.

76. In his evidence in chief, Mr Recht was asked by his counsel when "the process", which led to the execution of the deceased's last will, had commenced. Mr Recht referred to the telephone call from Mr Szmulewicz in early January 2008 and then went on to describe the series of meetings or attendances on Mr Szmulewicz, by reference to the numerous file notes he had made. This evidence revealed the existence of a further 15 file notes and the will executed by the deceased on 21 January

2008. In my opinion, all of these documents were discoverable.

77. When I asked Mr Recht how it was that these extra documents had not been discovered, his first answer was that he had "no part" in that decision. When I pointed out that he had sworn the affidavit of documents he then said that he "acted on advice". He agreed that he knew that the file notes were discoverable and said that he could only defend his position by saying that he was "against the decision not to discover them". This is simply no excuse, in my opinion. Mr Recht has been a solicitor since 1979. He described himself as a "commercial litigator" so he would have been very familiar with discovery obligations. I regard this episode as a quite disgraceful breach of the obligation to give full and proper discovery. No doubt other consequences will result from this breach.

78. Finally, I note that this is another example of the problem of having a solicitor's own firm represent him or her in litigation. I cannot accept that an independent solicitor would have given the same advice and would not have insisted that all of the documents be discovered.

Orders

79. As previously stated, the relief claimed by the plaintiffs was a declaration that the defendants held any benefit which they had received pursuant to clause 22(b) of the deceased's last will on trust for them as the residuary beneficiaries of the deceased's estate. In the circumstances, it seems to me that there should be:

(a) a declaration that the defendants hold the amounts paid to themselves, including GST, for commission and disbursements, on trust for the deceased's estate; and

(b) an order that the defendants repay to the deceased's estate the amounts paid to them.

The total amount can then be held pending the determination of the defendants' s 65 applications.

80. I will hear from the parties on the precise wording of these orders and on the question of interest on the amounts repaid and costs.