Neutral Citation Number: [2025] CA (Bda) 18 Civ

Civil Appeal No. 8 of 2025

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CIVIL JURISDICTION (PROBATE)
BEFORE THE HON. REGISTRAR WHEATLEY
CASE NUMBER 2025: No. 8

Dame Lois Browne Evans Building
Hamilton, Bermuda HM 12

Before:

JUSTICE OF APPEAL THE HON IAN KAWALEY
(Sitting as a Single Registrar of the Court of Appeal)

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Between:

1. DEBRA-ANN TUCKER
2. LISA YOUNG
3. VALERIE YOUNG

Applicants

- and -

1. DESIREE O'CONNOR
(sued both personally and in her capacity as Executor under the purported 30 March 2012 Will)
2. MJM LIMITED
(formerly known as MELLO JONES & MARTIN LTD.)

Respondents

Appearances:
The Applicants in person
Ms Jennifer Haworth, MJM Limited, for the 2nd Respondent

Hearing date(s): On the papers
Date of Ruling: 3 July 2025

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Extension of time within which to appeal application-probate dispute-appeal against striking-out of claim in negligence against attorneys retained by 1st Defendant to prepare the deceased's will-governing principles-Rules of the Court of Appeal Order 2 rule 4 (2), (3)

RULING ON APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO APPEAL

KAWALEY JA
(SINGLE JUDGE OF THE COURT OF APPEAL)

Introductory

1. On 18 February 2022, the Applicants issued proceedings against the 1st Respondent seeking to aside their father's will (the "Will"), which made provision for her but the Applicants), on the grounds of undue influence. The 2nd Respondent was sued for negligence in drafting the Will.

2. By a Ruling dated 10 May 2024, Registrar Alexandra Wheatley (the "Registrar") struck-out the Applicants' claim against the 2nd Respondent on the grounds that it (1) disclosed no reasonable cause of action and (2) was an abuse of process. Costs were awarded to the 2nd Respondent. The 2nd Respondent accepts the decision was final for appeal purposes. On that basis, a Notice of Appeal ought to have been filed within six weeks, or by 21 June 2024.

3. The present application was filed on 21 April 2025 and sought the following material relief:

> "*2. An extension of time for the filing and service of the Notice of Appeal, pursuant to the Court of Appeal Rules and/or the Supreme Court Rules, including but not limited to Order 59 and Order 3…*"

4. The Application set out supporting grounds and was evidentially supported by the Affidavit of Valerie Young sworn on 21 April 2025. This Court directed that the extension of time application would be dealt with initially on the papers, and the 2nd Respondent filed Written Submissions on 30 May 2025 to which the Applicants replied on 6 June 2025.

Legal principles governing extension of time within which to appeal applications

5. Order 2 of the Rules of the Court of Appeal was correctly identified by the Applicants as the governing rule. So far as material to an extension of time application, Order 2 provides as follows:

> "*(2) Every application for an enlargement of time within which to appeal shall be supported by an affidavit setting forth good and substantial reasons for the failure to appeal within the prescribed period, and by grounds of appeal which prima facie show good cause why the appeal should be heard. When time is so enlarged a copy of the order granting such enlargement shall be annexed to the notice of appeal.*
>
> *(3) An application for enlargement of time within which to appeal may be heard and determined by a single Registrar; but, if the Registrar refuses an application made under this provision, the party aggrieved by such refusal shall be entitled to have the application heard and determined by the Court.*"

6. On a straightforward reading of Order 2 rule 4 (2), which admittedly does not explicitly say this in terms, an extension of time may be granted where:

> (a) "*good and substantial reasons for the failure to appeal within the prescribed period*" are established; and
>
> (b) there are "*grounds of appeal which prima facie show good cause why the appeal should be heard*". In other words, the merits (broadly defined) of the appeal must justify ignoring the delay in pursuing the appeal.

7. In practice, strong merits will usually trump delay which is not clearly explained. Order 4 (2) must be read with Order 5 rule 1, which provides:

> "***5/1 Waiver of non-compliance with rules***
> *1 Non-compliance on the part of an appellant with these Rules or with any Rule of practice for the time being in force shall not prevent the further prosecution of his appeal if the Court consider that such non-compliance was not wilful, and that it is in the interests of justice that non-compliance be*

> *waived. The Court may in such manner as they think right, direct the appellant to remedy such non-compliance, and thereupon the appeal shall proceed. The Registrar shall forthwith notify the appellant of any directions given by the Court under this Rule, where the appellant was not present at the time when such directions were given.*" [Emphasis added]

8. Ms Haworth referred the Court to our own decision in *Andrew Crisson v Marshall Diel & Myers Ltd* [2020] CA (Civ) 15, which despite the official neutral citation was a Judgment delivered on 11 June 2021. In that case, Gloster JA opined as follows:

> "*50. ….Bell JA clearly took the view that it could be inferred from the requirement that the proposed appellant had to provide an affidavit stating 'good and substantial reasons for the failure to appeal within the prescribed period' per Order 2 Rule 4 (2) of the Rules, that the Court itself had to be satisfied that there were indeed 'good and substantial reasons for the failure to appeal within the prescribed period' before it granted leave. I accept that that is normally what is required but, in my view, the Court has a discretion, in an exceptional case, to give leave if it takes the view that there is good cause why the appeal should be heard notwithstanding there is some inadequacy in the reasons for the delay. There are two questions (a) whether there is good reason for the delay and (b) whether there are grounds which show good cause why the appeal should be heard. The absence of the latter would mean that leave should not be given. But if (b) is established the fact that the reasons for delay are less than 'good' is not inevitably fatal.*"

9. Kay JA and Clarke P concurred with the entirety of the leading Judgment in that case. The quoted principles articulated by Gloster JA in my judgment reflect the longstanding practice of this Court and are consistent with the constitutionally protected imperatives of access to justice. All applications for an extension of time within which to appeal fall to be determined by reference to two main considerations:

    (a) whether the applicant has shown good and substantial reasons for the delay (a factor which necessarily requires account to be taken for the length of the delay); and

    (b) whether the applicant has shown good cause on the merits for the appeal being heard.

Reasons for the delay

10. I only have regard to the reasons for the delay which the Applicants have been willing to advance on oath in their supporting Affidavit:

> "*3. The delay in filing this appeal was not intentional or due to neglect but rather arose from complexities in understanding the procedural and legal grounds required, coupled with my responsibility in managing the case without legal representation…*"

11. This might adequately explain a delay of a few days or weeks but is wholly inadequate to explain a delay of 10 months, particularly as the Applicants were represented at the hearing which resulted in the decision which they belated seek to appeal against.

Merits of the appeal

12. The failure to advance a good and substantial reason for the delay is not fatal, however, because the Court will not necessarily shut out an appeal where an applicant for an extension of time can demonstrate that justice requires that the appeal may be heard. Generally, that will require the applicant to show that they have good arguable grounds of appeal. There may be exceptional cases where fresh evidence comes to light after the lower Court's decision which provides a new basis for challenging the decision not apparent when the decision is made. This would both explain why the applicant did not appeal within time and constitute a good reason for the appeal being heard. Ordinarily, where a litigant has their claim struck-out on questionable legal grounds and is legally represented, they will seek and receive advice on the merits of appeal in the immediate aftermath of the adverse decision. If funding an appeal is problematic, a "holding appeal" is filed at minimal cost which reserves the right to supplement the grounds later. When this does not occur, the Court is entitled to view with some scepticism any suggestion that the applicant has only belatedly been advised or realised that an appeal should be pursued. The 2nd Respondent suggests that the Applicants only demonstrated any interest in an appeal when it was advancing the taxation of its Supreme Court costs. This background does not directly bear on the merits of the Applicants' appeal, but it provides no indirect support for their case on the merits either.

13. In the present case the Applicants essentially complain that the Registrar's decision when made was wrong and so whether the appeal should be heard turns pivotally on evaluating the merits of the grounds of appeal. The key passages in the Ruling supporting the finding that no reasonable cause of action was disclosed by the Applicants' claim against the 2nd Respondent were the following:

> "*32. For a claim in negligence (tort) to be made against a person or entity, the starting point is that there must be shown that the defendant owed a duty of care to the claimant. In most circumstances, this duty will arise out of contract. However, where there is no contractual duty, the principle of White v Jones may be used to fill this gap by extending the duty of care to a drafting attorney. What White v Jones does not do, however, is provide a blanket principle that all intended beneficiaries are owed a duty of care by an attorney*

drafting a will for a testator/testatrix. Lord Goff at 269 in White v Jones stated:

> *'Unlimited claims I come finally to the objection that, if liability is recognised in a case such as the present, it will be impossible to place any sensible limits to cases in which recovery is allowed. Before your Lordships, as before the Court of Appeal, Mr. Matheson conjured up the spectre of solicitors being liable to an indeterminate class, including persons unborn at the date of the testator's death. I must confess Page 12 of 15 that my reaction to this kind of argument was very similar to that of Cooke J. in Gartside v. Sheffield, Young & Ellis [1983] N.Z.L.R. 37, 44, when he said that he was not "persuaded that we should decide a fairly straightforward case against the dictates of justice because of foreseeable troubles in more difficult cases." We are concerned here with a liability which is imposed by law to do practical justice in a particular type of case. There must be boundaries to the availability of a remedy in such cases; but these will have to be worked out in the future, as practical problems come before the courts. In the present case Sir Donald Nicholls V.-C. observed that, in cases of this kind, liability is not to an indeterminate class, but to the particular beneficiary or beneficiaries whom the client intended to benefit through the particular will. I respectfully agree, and I also agree with him that the ordinary case is one in which the intended beneficiaries are a small number of identified people. If by any chance a more complicated case should arise to test the precise boundaries of the principle in cases of this kind, that problem can await solution when such a case comes forward for decision.' [Emphasis added]*

33. Additionally, I accept that the legal principles set out in Worby are directly applicable to this case. It matters not that this is an interlocutory application where no evidence is being tested. The key premise set by Worby is that allegations against an attorney that he or she was negligent for failing to ensure a testator had the capacity to make the will and that there was no undue influence exerted on the testator by a beneficiary under the will, does not give rise to circumstances that are apt for the duty of care to be extended between attorney and an intended beneficiary.

34. I am reminded of the foundational particulars of the Claim set out in paragraphs 8, 10, 12 and 13 which are as follows:

> *'8.…It is the claim that at this time the First Defendant used undue influence over the Testator in an effort to circumvent his true intention to have all of his children benefit from his estate in equal shares to the detriment of the Plaintiffs.'*
>
> *10. Accordingly, the Plaintiffs contend that at all material times the Testator wished to set up a trust for his estate from which all of his daughters would benefit and it is averred that the First Defendant did*

> *exercise either duress or undue influence over him to the detriment of the Plaintiffs. …*
>
> *12. It is alleged that Second Defendant acted in breach of its professional duties in its construction of the purported Will and in doing so created a document which had not been duly executed in that they:…*
>
> *13. Further, and as a result of the above it is asserted that the Testator could not have approved the Will with knowledge of its contents.'*
>
> *35. I see no reason why the principle in Worby that undue influence is not a circumstance where the drafting-attorneys (the Second Defendant) owe a duty of care to the beneficiaries (the Plaintiffs) should not be followed.*
>
> *36. The Plaintiffs' assertion that this Court should shift the burden of proof away from them and place it on the Second Defendant must be addressed. The onus is not on the Second Defendants to demonstrate (i) that the Plaintiffs were not possible beneficiaries; (ii) that the First Defendant was the only intended beneficiary; and (iii) of what was shared between the Testator and the Second Defendant. In accordance with Walker the Will is evidence of the Testator's intentions, and it is for the Plaintiffs to prove otherwise.*
>
> *37. As it relates to the principle in Byrn v Farris that an intestate successor cannot be considered an intended beneficiary, this is unequivocally applicable in this matter. The Plaintiffs only ever would have been intestate successors as there was no previous will.*
>
> *38. Considering the allegations made as well as the relief sought in the Claim, and applying the legal principles set out in paragraphs 32 to 37 above, I find that there is no lacuna to fill which would require the duty of care to be extended to the Second Defendant. Ergo, there is no reasonable cause of action.*"

14. The quoted passages set out a very clear analysis of a fundamental principle of the law of torts as explained in a highly persuasive decision of the House of Lords in *White-v-Jones* [1995] 2 AC 207; [1995] UKHL 5. The principle established is that when a lawyer is instructed to draft a will in favour of beneficiary A, the lawyer assumes no duty of care to potential beneficiaries B, C, or D. This principle defines the potential beneficiaries by reference to whom they appeared to be to the lawyer at the time (i.e. who was to benefit from the relevant will). If the testator's execution of the will is later shown to be invalid because of undue influence or incapacity, this cannot retrospectively impose a duty of care on the lawyer to those who would be entitled in the event of intestacy.

15. This principle is based on legal policy reasons. It is undesirable that the law should impose a duty of care in tort on lawyers drafting legal instruments in favour of persons whose interests their instructions do not logically require them to have regard to. A duty of care

is primarily owed to the testator by the lawyer drafting a will, but that basic rule was extended in *White-v-Jones* to the intended beneficiary as well if that beneficiary suffered a loss which the estate could not recover. There is no recognised legal basis upon which persons whom a will did not benefit can claim that the drafter of the will owed them a legal duty to have regard for their interests as well as those persons their client instructed them to benefit. This principle appears to be a settled principle, and my own research confirms that *White-v-Jones* was approved by the Privy Council in *Royal Bank of Scotland International Ltd-v- JP SPC 4 and another* [2023] AC 461; [2022] UKPC 18.

16. The Applicants advance no basis at all for undermining the legal basis of the main plank of the Registrar's decision to strike-out their claim on the legal ground that it discloses no reasonable cause of action. This strike-out ground requires the respondent to demonstrate, without regard to the evidence, that the claim asserted by the claimant is legally flawed on the assumption that the factual basis for the claim can be proved. Assuming the Applicants prove that the Testator in executing the Will did not express his true intent because of undue influence, that does not support their case in negligence against the lawyers who drafted the Will. The following key assertion is made in their supporting Affidavit:

> "*8. Our appeal is based on the grounds that the Registrar failed to properly consider or apply established legal principles in cases where professional negligence by a solicitor may potentially harm third-party beneficiaries.*"

17. This core argument is, with respect, based on a misunderstanding of the principles considered in *White-v-Jones* and other relevant case law. Where a will expressly excludes other potential beneficiaries (as appears to be the case here), the lawyer drafting the will only owes a duty to the testator and those who according to the will his intended beneficiaries are. The Applicants seek to invalidate the Will through their undue influence claim against the 1st Respondent. While they complain about a medical condition the Testator had, they do not seek to invalidate the Will on the basis of incapacity. As the Registrar expressly found, a person taking instructions from a testator whose consent is invalidated by undue influence does not owe a duty of care to other potential beneficiaries. However, the position appears to be the same based on the case she considered (*Worby*) even if the Applicants were alleging that the Testator lacked capacity. In *Fuller-v- HFT Gough & Co* [2019] EWHC 1394 (Ch), a case which I have identified which considers *Worby*, Master Schuman held as follows:

> "*45. First, as a matter of law the claimant cannot establish that the defendant owed him a duty of care. The defendant relies on Worby v Rosser [2000] PNLR 140 (CA). In this case the beneficiaries under a 1983 will challenged the grant of probate in respect of the 1989 will and sought a grant in respect of the 1983 will. After a long trial the judge determined that the 1989 will was*

> *invalid; the deceased lacked testamentary capacity, he did not know and approve of its contents and its execution was obtained by the undue influence of T, one of the beneficiaries under the 1989 will. The beneficiaries brought a professional negligence claim against the solicitors who had prepared the 1989 will alleging that they owed them a duty to take reasonable care to ensure that the testator had testamentary capacity, knew and approved of the contents of the 1989 will and that it had not been obtained by undue influence. The existence of that duty was determined as a preliminary issue against the beneficiaries.*
>
> *46. The appeal from that decision was dismissed. Chadwick LJ at page 149C,*
>
> *'The remedy fashioned on White v. Jones was needed to fill a lacuna. The remedy is provided in circumstances in which it can be seen that there is a breach of duty by the solicitor to the testator in circumstances in which the persons who have suffered loss from that breach will have no recourse unless they can sue in their own right. In a case like White v. Jones the disappointed beneficiary suffers loss but the estate does not because nothing that the solicitor has done or failed to do causes any diminution in the estate.*'" [Emphasis added]

18. This discussion of the case relied upon by the Registrar in her Ruling confirms that the established legal position is that where persons, like the Applicants, succeed in demonstrating that a will which excluded them from benefitting from the testator's estate is invalid because of his incapacity or by reason of undue influence, the lawyer who drafted the invalid will does not as a matter law owe the excluded beneficiaries a duty to protect them from the relevant loss. There may of course be cases where special circumstances will result in a lawyer becoming subject to a duty of care, for instance where they are aware of recent promises made to make provisions inconsistent with the will or are put on notice that the testator may lack mental capacity.

19. It is appropriate in the context of analysing the main strike-out ground to assume both that (1) the Applicants claim against the 1st Respondent succeeds and the Will is set aside and (2) that the 2nd Respondent did indeed fail to exercise reasonable care to have regard to the Applicants' interests. Assuming that in their favour, the Registrar correctly found, no duty of care would be owed by the 2nd Respondent and so their claim in negligence would fail as a matter of law. The discussion about the burden of proof being on the Applicants to disprove the Will (Ruling, paragraph 36) appears to overlook the requirement in a no reasonable cause of action strike-out to assume that all facts alleged by the plaintiff will be presumed. However, applying what I consider to be the correct approach, the substantive legal result on the duty of care issue is unaffected.

20. These special rules in relation to the formation of the duty of care in the context of lawyers drafting wills, which apply whomever the lawyers may be and developed in the late 20th

and early 21st centuries, cannot be displaced by reliance on more general rules relating to the duty of care such as those established almost 100 years ago in the seminal case of *Donoghue-v-Stevenson* [1932] AC 562. There may of course be cases where special circumstances will result in a lawyer becoming subject to a duty of care, for instance where they are aware of recent promises made to make provisions inconsistent with the will or are put on notice that the testator may lack mental capacity. Some of such cases were considered in the Ruling but the principles they applied clearly did not apply to the present case.

21. The Registrar grounded the first limb of her strike-out decision on this substantive legal basis, which was clearly fully argued, rather than the seemingly simpler alternative limb that the Applicants had sued the wrong entity. Be that as it may, I am bound to find that the Applicants have failed to identify a sufficiently arguable ground of appeal against this aspect of the Ruling to justifying granting them an extension of time for appealing the decision that their claim discloses no reasonable cause of action against the 2nd Respondent.

22. In these circumstances I see no need to consider the Registrar's alternative abuse of process ground for striking-out, the basis for which is closely aligned with the no reasonable cause of action ground. However, in summary, I agree that it is difficult to identify what relief the Applicants could possibly seek from the 2nd Respondent, whether the Will is set aside as a result their claim against the 1st Respondent succeeding, or if that claim fails and the Will which excludes them prevails.

Disposition

23. For the above reasons the application for an extension of time within which to appeal is refused. Any residual discretion this Court might possess to extend time should in my judgment be exercised in favour of protecting the Applicants from exposing themselves to the risk of further adverse costs orders.

24. In principle the 2nd Respondent is obviously entitled to its costs of the present application. However, in the hopes that the parties may reach some agreement which obviates the far greater costs of a renewed application before the Full Court to be incurred, I would reserve the costs of the present application.