

**DATA CERTAINTY LTD
THE NATIONAL WILL REGISTER**

**POTENTIAL LIABILITY FOR PROFESSIONALS
WHO DO NOT REGISTER A WILL,
DO NOT RESPOND TO A WILL SEARCH OR
DO NOT SEARCH FOR A WILL WITH CERTAINTY THE
NATIONAL WILL REGISTER**

O P I N I O N

1. In this Opinion, I consider what the risks are for solicitors (and other professionals) in:
 - a. Not registering a Will with Certainty,
 - b. Not responding to a Certainty search,
 - c. Not themselves making a Certainty search.
2. It will be clear, from what I say below, that solicitors (and other will writers or probate practitioners) are at serious risk of being found negligent, and potentially paying out substantial damages, for not offering the client the option of registering the Will with Certainty, and for not making, or responding to, a Certainty search.
3. There is already a decision of the highest authority in Australia which establishes that a solicitor who holds a Will is under a duty to produce it when informed of the testator's death. That means that it undoubtedly is a solicitor's duty to respond to a Certainty search. Case law also points, by principle and analogy, directly towards a finding of negligence in the other two areas: not registering a Will, and not making a Certainty search before applying for a grant.

Duty to register a Will with Certainty?

4. There is no absolute duty on a solicitor to register with Certainty a Will the solicitor makes for a client. The client is the person who is entitled to decide what happens to his or her Will, once it is made. The client is, for instance, free to insist on retaining the Will at home. But in my view it is extremely probable that a solicitor who does not offer his client the option of registering the Will with Certainty will be liable to be found negligent. It is also strongly arguable that the solicitor should not just offer the option, but advise registration.
5. The basis of any solicitor's liability to his client is the retainer (**White v Jones** [2005] 2 AC at p. 256C). The retainer is the contract under which the client retains the solicitor to perform a service. If the client gives the solicitor instructions not to register the Will, then that instruction limits the

retainer, and the solicitor can be under no duty to the client (or through the client to his intended beneficiaries), to register the Will.

6. But the solicitor's duty, in both contract and tort, is to perform the service for which he is retained to the standard of a reasonably competent solicitor. The retainer is rarely completely specific, so that what is done under the retainer is as much a factor of the standard of care, as how it is done. Where a solicitor is retained by a client who wishes to make his Will, the client is unlikely to be aware of the possibility of registering the Will with Certainty the National Will Register (which I will refer to in the rest of this Opinion simply as "Certainty"). He will not, therefore, specifically retain the solicitor to register the Will.
7. But that is not the final word: if it is part of the standard of care of a reasonably competent solicitor either to offer the option of, or to advise, registration with Certainty, then that forms part of the wider retainer to act and advise on the Will.
8. Is it, therefore, within the standard of care of a reasonably competent solicitor to offer or recommend registration with Certainty?
9. Whenever such a case comes before the court, the decision will be fact-specific. But in general terms, unless there is a very long-standing and well-known connection between the firm and the client, and sometimes even then (since many years may elapse and many circumstances may change between the making of the Will and the testator's death), there must be very considerable advantages from the client's point of view (and in the interest of the intended beneficiaries) in registering the Will with Certainty. Registration with Certainty ensures that the Will has the greatest chance of being admitted to probate, and therefore the greatest chance that the gifts set out in it will reach the testator's intended heirs.
10. Given therefore that:
 - a. Registration of a Will with Certainty substantially increases the prospect of the Will being carried into effect.
 - b. Registration with Certainty is a simple process.
 - c. Registration with Certainty is a confidential process. When a search is made, Certainty does not give any information about the Will to the searcher, but contacts the person with whom the Will is registered, thus ensuring confidentiality.
 - d. Registration with Certainty is at most at a nominal cost and, I understand, free in certain circumstances,the argument that giving advice about registration with Certainty is a part of the standard duty of care of a competent will-practitioner is a relatively easy one to make.

11. This Opinion necessarily deals with the question of liability in the abstract. It must, however, be appreciated that the courts will only deal with a claim based on failure to register a Will when they are presented with a set of facts which includes non-registration of a Will, a search of the register, and the mistaken administration of the estate under an earlier Will or intestacy. It will then be very difficult in practice to argue that the failure to give advice about the simple and cheap act of registration was not a negligent omission. Nor is the court likely to have any truck with an attempt to argue that the testator would not have wanted to register his Will, even if he had been advised. The advantages would have become crystal-clear by the time of the trial of the action. It is difficult to imagine that the court would ignore that, and decide that the testator would not have been prepared to pay a very small sum effectively to ensure that his Will was carried out.
12. There is said to be a general rule that a solicitor who makes a mistake while “*acting in accordance with the general practice of the profession*” will not normally be regarded as negligent: see Jackson & Powell Professional Negligence (7th Ed) para. 11-092.
13. The practitioner who had not advised registration of the Will, would therefore have to try to defend himself on the basis that he was “*acting in accordance with the general practice of the profession*”. If by the time the Will was made, the general practice of the profession favoured will-registration, then the defence would fail on the facts. But even if the argument was run in the context of a Will made at a time when there was no clear general practice favouring will-registration, I consider that the argument would still fail.
14. The rule, like any general one, is subject to exceptions. One of the exceptions is that a solicitor will be found negligent if:
 - a. There was a foreseeable a risk.
 - b. There was a simple method of avoiding that risk (particularly where – as here – the method is relatively inexpensive).
15. Authority for that exception to the general rule is the important Privy Council case of **Edward Wong Finance v Johnson Stokes & Masters** [1984] AC 296. That case considered Hong Kong-style conveyancing, where the purchaser’s solicitor routinely accepted the vendor’s solicitor’s undertaking to discharge the mortgage. In the Edward Wong case, the vendor’s solicitor absconded with the purchase money, and the purchaser did not receive a title free of mortgage. Despite the evidence that the practice adopted by the defendant solicitors on completion was the almost universal practice adopted by Hong Kong conveyancing solicitors, it was still held by the Privy Council to have been negligent.

16. The Privy Council held that the risk of the mortgage not being discharged was a foreseeable one. It further held that the risk could have been avoided by the purchaser's solicitor by the simple precaution of establishing that the vendor's solicitor had the mortgagee's authority to act, and by making 2 payments on completion, one to the mortgagee satisfying its debt, and the other for the balance of the purchase price to the vendor.
17. The Privy Council was undoubtedly influenced by the fact that the Hong Kong Law Society had indeed recommended that those precautions be taken, even though the profession had not taken up those recommendations.
18. How does the decision in **Edward Wong Finance v Johnson Stokes & Masters** apply here?
- a. First, the defendant solicitors will not have the luxury of arguing that it is the almost universal practice of the profession not to register Wills. Very many solicitors already do just that. Some 3 million Wills are, I understand, already registered within the Certainty system, and that number is increasing each day.
 - b. Second, the court will readily find that there is a foreseeable risk (save in exceptional circumstances) that not registering a Will, will result in that Will not being discovered post-death.
 - c. Third, the court will also readily find that the risk could have been simply avoided by registration (on the assumed facts of the case that a search was made post-death), and at very little cost.
 - d. Fourth, the court will be influenced by the reference to the advantages of registering a Will with Certainty, set out in the Law Society's Probate Practitioner's Handbook at para. 16.22 (and indeed elsewhere).
19. As a decision of the Privy Council, **Edward Wong Finance v Johnson Stokes & Masters** is not technically binding on an English court, though obviously very persuasive. But it has been approved by the House of Lords in **Bolitho v City & Hackney Health Authority** [1998] AC 232, at p. 242, and in the Court of Appeal in **NHL v Kaufmann** (unreported), so that there can be no doubt that it represents the law. The **NHL** case is of particular interest because against it involves solicitors. Millett LJ said:

“A solicitor is perfectly entitled to adopt [the practice which was followed in the Wong case] as a convenient course. The question is whether it was right for them to adopt the practice at their client's risk, and not at their own. The Privy Council made it clear that the solicitor who failed to adopt the simple procedure which could have avoided the risk to his client, is not to be criticized, but he does so at his own risk and not his client's.”

20. It follows from that passage that a solicitor who chooses not to advise his client about the ability to register a Will with Certainty, is extremely likely to be found to have taken on himself the risk that that Will will not be found by a subsequent will-search.

Duty to register historic Wills held by a firm?

21. I do not consider that a court is likely to find that a solicitor is under a duty now to register Wills which were made before the Certainty will-registration was available. The basis of the solicitor's duty to his client is, as I have said above, the retainer. If at the time of the retainer, Certainty was not already in operation, then advising about registration with Certainty could not have been part of that retainer. Any Will deposited with the solicitor from those days must have been deposited in accordance with the law and practice existing at the time.

22. If a solicitor charges his or her client an annual fee for holding the Will, matters may be different: it could then be argued that the developing understanding of risks associated with lost Wills, and of the advantages of registration, combine to require advice to be given to the client to register the Will, rather than relying on deposit with the firm of solicitors as sole protection. I would not regard such an argument as by any means clear-cut. The court might be influenced by the fact that registration of historic will-banks with Certainty is free of charge. Registration would involve some time-costs. Whether the low cost and ease of registration would overcome the court's likely approach to the deposit as under an original retainer, which is simply renewed each year on the same terms, is an open question. I would tentatively conclude that the court would probably not consider that the retainer was for anything other than simply holding the Will.

23. But a solicitor is in a much more difficult position in relation to more recent, unregistered Wills. Wills, that is, which were made after Certainty achieved wide-spread publicity through the legal profession. What we cannot know, until a court case is decided, is from what point in time any court will conclude that it was negligent to fail to advise about registration of Wills. If that point in time has already arrived, as I conclude above, it must have arrived some time ago. It therefore follows that solicitors may now hold Wills in respect of which they were negligent in not advising the client to consider registration. The issue is not simply one which needs to be confronted in relation to Wills yet to be made.

24. Solicitors should therefore carefully consider the risks involved in not registering Wills created in the past 3 – 5 years. There must be a very serious risk that – at least in relation to the more recent of them, and possibly in relation to them all – a court would find the firm negligent for failing to advise the client about registration, when the Wills were made.

Duty to respond to a Certainty search?

25. There are, as I understand it, two types of Certainty search. The simplest is a Certainty Register Search. A Certainty Register Search, as the name implies, searches Certainty's register, and informs any person or firm noted on the register as holding the Will, of the request for a search. The more complex is the Certainty Reach Search. The Certainty Reach Search aims to identify firms of solicitors that may potentially hold the deceased's Will, and contacts them to find out whether they do.
26. Any firm registered as the holder of a Will undoubtedly accepts the obligation to respond to a Certainty Register Search. That is implicit in the fact that the Will was registered with Certainty. That obligation, in common with the duty under **White v Jones** to act in the preparation and execution of the testator's Will, is a duty owed both to the testator's estate and to his beneficiaries.
27. It must also be true that any solicitor, by virtue of the fact that he or she is holding a Will, is under a duty to respond to a Certainty Reach Search. There is High Court (the highest appeal court) authority in Australia, **Hawkins v Clayton** [1987-8] CLR 539, for the proposition that a solicitor who is informed of the death of a testator, whose Will the firm holds, must attempt to contact the executor. If the executor cannot be found, or is dead, the solicitor must contact the beneficiaries under the Will.
28. In **Hawkins v Clayton**, the solicitor retained the client's Will, made in 1970, for safekeeping. She was considering changing it in 1971, and asked for it back, but the solicitor only sent her a copy. In 1973, the client again contacted the solicitor, and told him she was considering changing the Will so as to exclude her executor and residuary beneficiary, because they had fallen out. In 1975, she died. A couple of days later, the solicitor was told of her death, and his firm then performed some preliminary services in the administration of the estate. They did not take any steps to find the executor, who was no longer at the address on the Will but could have been found by looking in the telephone directory. In 1981 (after the solicitor involved had retired from the firm), steps were taken to contact the executor/beneficiary who then proved the Will with a new firm of solicitors. As Deane J said at page 580:

“In accepting responsibility for custody of the testatrix' Will after her death, the firm effectively assumed the custodianship of the testatrix' testamentary intentions. If the firm simply retained custody of the Will without disclosing its existence to anyone at all, those testamentary intentions would obviously be likely to be frustrated....”

The majority of the High Court of Australia court found no difficulty in concluding that a duty was owed to the client's executor to try to find him and pass the Will to him, once they learned that the client had died.

29. A dissenting, minority judgment was given by two of the members of the court. But the reasons on which they decided in favour of the solicitors would not succeed today in England & Wales, nor on the inevitable facts of the case.

a. The minority were of the view that no active duty could be implied into the deposit of the Will, to take steps to find the executor on hearing of the death. Their view was that it was up to the testatrix to tell her executor where her Will was. But on the facts of any case relating to a Certainty Search which came before the court, the solicitors would not be alleged to be under a duty to initiate some set of acts, but merely to respond to the search. If the executor had asked the Australian firm of solicitors for the Will, then the minority would have considered that they were obliged to hand it over. Where Certainty send a firm of solicitors a Certainty Reach Search, the firm is on notice not just that the testator is dead, but that the executor may either not know he is executor, or not know about the Will (or may have died). The solicitor could scarcely hope to defend inaction in that context, any more than he could if the executor asked for the Will.

b. The minority accepted that there are circumstances where a solicitor may become liable by assumption of responsibility. But, they considered that no voluntary assumption of responsibility occurred on the facts. In **White v Jones**, however, the House of Lords decided that there most definitely was an assumption of responsibility by solicitors who acted in the preparation and execution of a Will. It is inconceivable that an English court would not apply the same assumption of responsibility to the retention of the Will post-execution, as the House of Lords has held applies to the making of the Will.

30. In **White v Jones** the House of Lords referred to **Hawkins v Clayton** as showing the Australian approach to claims by beneficiaries of estates. Although the House of Lords did not explicitly approve the Australian's court's approach, since it effectively adopted it hook, line and sinker, it must be tolerably clear that the majority view in **Hawkins v Clayton** would be followed in this country.

Duty to make a Certainty search before applying for a grant/letters of administration

31. Any solicitor who fails to carry out a Certainty search, when instructed to obtain a grant of probate of letters of administration in a deceased's estate, is at extremely serious risk of being found negligent, should a Will later emerge which the search would have revealed.
32. The solicitor in question will have been retained to obtain a grant of probate under what is thought to be the last Will, or to obtain letters of administration, where no Will has been found. The solicitor's duty – again – is to act to the standard of a reasonably competent solicitor. The existence of a valid Will, where the client assumes there is none, or the existence of a later Will, where the client assumes the Will he has is the last one, could each affect the estate's administration substantially. The client, acting as personal representative, may – for instance – risk paying out substantial sums to the wrong beneficiaries. It is therefore crucially important to the estate administration that the solicitor should, on the client's behalf, take all reasonable steps to establish whether the client actually has the last Will, or whether there is an intestacy.
33. Many solicitors will already carry out a Certainty search as a matter of routine, particularly if there appears to be an intestacy. I understand that the Treasury Solicitor always carries out a Certainty search where there is reason to believe that the estate may pass as bona vacantia to the Crown. There may be borderline cases where the Will is a recent one, and the testator well-known to the firm of solicitors. But even there, it is notorious how often the elderly change their Wills in their last years, and use new solicitors to do so.
34. The figures speak for themselves, in my view. There are some 3 million (and rising) Wills registered within the Certainty system. In certain contexts, 30% of Certainty searches reveal an unknown Will. That does not, of course, mean that if every solicitor applying for probate carried out a will-search, there would still be a 30% "hit" rate. I imagine it is that high because many searches are carried out in circumstances where there is already doubt whether the last Will is held, or there really is an intestacy. But given:
 - a. The significant prospect of finding a Will,
 - b. The very substantial potential cost of administering an estate without knowing the contents of the last Will, and
 - c. The relatively very low cost of a search,

it must follow that (absent special factors) a Certainty search is essential to avoid a finding of negligence. Again, it must be appreciated that this question will only come before the courts, when the valid last Will has emerged after the event, and it could have been found by spending either £33 on a Certainty Register Search, or £90 on a combined Certainty

Register and Certainty Reach Search. Any suggestion against that background that the expenditure was an unnecessary or unjustifiable one, will be laughed out of court.

35. A very strong indication of the courts' likely approach can be found in **G & K Ladenbau Ltd v Crawley & De Reya** [1978] 1 WLR 266. That case involved a commons register search. The commons register had been started in 1965. Before then, there was no specific register to register rights of common, and no way of searching to see whether such rights might exist. In 1972, some 7 years after the register had started, G&K Ladenbau bought for £30,000 some mainly-vacant land by a river, which had recently been used as a lorry-park. Their solicitors did not carry out a commons search. G&K Ladenbau then tried to sell it on, a few months later, for £100,000. The purchaser's solicitor did carry out a commons search, and discovered a registration against the land made (in error) in 1969. G&K Ladenbau's solicitor was held liable for the costs resulting from a delay in completing the second sale, while the register entry was removed.
36. G&K Ladenbau's expert gave evidence to the effect that he always carried out a register search. The defendants called expert evidence to the effect that solicitors did not always carry out commons searches. But that was not enough to defend the claim successfully. The judge was influenced by two factors:
 - a. First, there was the serious potential for loss if there was a commons right entered on the register, compared to the ease and very modest cost of the search fee.
 - b. Second, even the Defendant's expert considered that on the facts he might have carried out a search. Although there was nothing to suggest any commons right existed (and the use as a lorry park was scarcely consistent with any such right) the fact that the land had at some stage been waste land of a manor, suggested a search might be sensible.
37. Two lessons can be learned by solicitors acting in the administration of estates, from the **G&K Ladenbau** case.
 - a. Where a search is cheap and easy, and the potential losses occasioned by ignorance substantial, the court will readily conclude that a solicitor ought to carry out the search.
 - b. When disaster has struck, the factual circumstances are likely to lead any expert (giving evidence with the benefit of hindsight) to say that he would have carried out a search in those circumstances.

38. It is not relevant that Certainty is a commercial organization providing a service at a profit. While the Land Registry, local land charges register and commons register are all government-run, that is a distinction without a difference. The Government has given consideration in the past to privatising the Land Registry. It is inconceivable that merely by privatising it, solicitors would be released from a duty to carry out a Land Registry search. The only relevant issue is what the register contains, and what the search involves, not who owns the register. The Government has for very many years provided a facility to lodge Wills in advance of death with the Principal Probate Registry. There has been so little take up of this service, however, and so few Wills registered, that a failure to search there would be most unlikely to be considered negligent.
39. The fact – if it is a fact – that many solicitors do not carry out Certainty searches, will not provide a sound defence to the claim in negligence, for the same reasons that I have set out above in relation to a duty to register:
- a. The risk that there may be a (later) Will is foreseeable.
 - b. The search is simple and cheap.
 - c. The Law Society's Probate Handbook gives guidance on the use of a Certainty search, as does the authoritative Tolley's Administration of Estates at para. B4.3 (published by Lexis Nexis in association with the Society of Trust & Estates Practitioners).

To whom are the duties owed, and what potential losses may be recoverable?

40. The duty to advise about registration is owed directly to the testator, and through the testator to the testator's personal representative (the executor or administrator if the executor renounces probate or dies) on behalf of the estate. It is also owed to the beneficiaries under the Will, under the principles enunciated in **White v Jones**. The duty to respond to a search request is owed to the personal representative, but also to the beneficiaries (see **Hawkins v Clayton**).
41. The loss which may be recoverable under the duty to register and to respond to a request falls into two categories:
- a. Losses to the estate itself. Those losses are mainly but not exclusively delay-related. They may include:
 - i. Extra tax liabilities arising from delay in obtaining a grant of representation.
 - ii. Extra costs involved in administering the estate under two different documents or regimes.
 - iii. Loss in capital value of the estate, for instance market losses to investments and dilapidation to properties.

- iv. Loss in income to the estate (e.g. properties not rented out, rents not collected).
 - b. Losses to the beneficiaries, particularly arising from the distribution of assets to the wrong beneficiaries, in circumstances where they cannot be recovered from the recipients.
42. The duty to carry out a Certainty search is owed to the executor/administrator for whom the solicitor acts. So all costs associated with the fact that the first probate must be revoked and a second probate carried out, will be recoverable. Generally speaking, a solicitor acting in the administration of an estate owes no separate duty to the beneficiaries of the estate: see, for instance, **Royal Brunei Airlines v Tan** [1995] 2 AC 378, at p. 391. But the solicitor will undoubtedly be the target for a claim for the money paid out (or the costs of recovering that money, if recoverable), if the estate has been paid out to the wrong beneficiary as a result of a failure to search. The actual personal representative, acting under the grant that is later revoked, ought to be free from personal liability under s. 27(1) Administration of Estates Act 1925, since he acted under an apparently proper grant in good faith. But the claim against the solicitor will be formulated as a claim by the estate itself, for money lost to the estate. Failing that, it may be argued that, by analogy with **White v Jones**, the disappointed beneficiaries must have a claim, or the negligent solicitor goes scot-free.

Professional executors' costs

43. There is a further significant issue for solicitor/executors acting in an estate, where the grant under which they were acting is later revoked. Professional executors who have so acted will be liable to repay all fees charged by them to the estate. They will be allowed to retain only such fees as they can justify as (a) reasonable and for the benefit of the estate, and (b) which could properly have been done in relation the true last Will eventually proved. Authority for that can be found in **Gray v Richards Butler** an unreported decision of Carnwath J given on 16 July 1996.

Conclusion

44. Given the vast upheavals in professional indemnity over recent decades, the ever-increasing claims culture and the effect on the cost of professional indemnity insurance of claims, it is very important for solicitors (and other professionals) to appreciate not just what the currently established risks are, but also what the current potential risks may be. Until a few years ago, it was relatively unheard-of for solicitors to be sued for acting for a testator, where he lacked capacity, or did not know or approve of the contents of his Will. Such claims are now common-place. The landmark House of Lords decision of **White v Jones** itself warns that the law of negligence will be developed on an incremental basis in the future. There can be no doubt:

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liability for failure to register with Certainty, for failure to respond to a Certainty Search, or for failure to carry out a Certainty Search, is an inevitable increment.

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