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SINS OF THE FATHER

Anwar Patrick Adrian v Ng Chong & Hue LLC[1]

COLIN **LIEW***

I. INTRODUCTION

In *White v Jones*,[2] the House of Lords controversially extended liability in the tort of negligence to solicitors who had caused economic loss to a third party by failing to take proper care in drawing up a will for their client, supposedly on the basis of an "assumption of responsibility". In *Anwar*,[3] the Court of Appeal has now sought to rationalise *White* within the analytical framework laid down in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency*.[4]

The judgment in *Anwar* is of a considerable length, and this note focuses primarily on the Court of Appeal's analysis of *White*, as well as its treatment of the relevant duty of care issues. It is suggested that *Anwar* may prove to be even more controversial than *White*, and may perhaps create difficulties for subsequent courts[5] as regards the respective ambits of the tort of negligence and privity of contract.

II. THE FACTS

The plaintiffs ("Adrian" and "Francis") were the sons of a well-known businessman ("Agus") with whom the defendants, a solicitor ("Ng") and his law firm,[6] had a longstanding professional relationship.

In 2006 and 2007, Agus instructed Ng to effect purchases of four properties:

(1) Two properties in Devonshire Road purchased in the respective names of Adrian and Francis (the "Devonshire Properties"); and

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1 [2014] 3 SLR 761 (CA) [*Anwar*].

2 [1995] 2 AC 207 (HL) [*White*].

3 *Anwar*, *supra* note 1.

4 [2007] 4 SLR(R) 100 (CA) [*Spandeck*].

5 After this note had been accepted for publication, the High Court handed down judgment in *AEL v Cheo Yeoh & Associates LLC* [2014] 3 SLR 1231 (HC) [*AEL*], which contains a valuable discussion of *Anwar*. Space precludes a detailed consideration of *AEL*, but references will be made to it where appropriate. The decision in *AEL* has since been appealed to the Court of Appeal in CA 114/2014.

6 As nothing turns on the separate identities of Ng and his law firm, only Ng will be referred to herein.

(2) Two properties in Scotts Road purchased in the respective names of two companies ("SITPL" and "SSTPL") of which Adrian was the sole shareholder and director.

Agus had a collateralised credit facility with a bank ("SGBT"). As a result of the 2007-2008 global financial crisis, Agus' collateral plunged in value, leaving a shortfall on the facility of US$8m. SGBT required Agus to meet the shortfall, and Ng acted for Agus in negotiating the further security to be provided.

SGBT proposed that Agus procure mortgages over the four properties in favour of SGBT, and that Adrian, Francis, SITPL and SSTPL, as owners of the four properties, guarantee Agus' liability to SGBT.

Ng informed SGBT that Agus was agreeable to this proposal, save for the condition that Adrian and Francis furnish personal guarantees, as they were merely "2 young boys", "hardly able to provide any real security" to SGBT.[7] At this point in time, Adrian was 28 years old and working while Francis was 25 years old and studying in the United States.

Ultimately, the parties agreed in principle that SGBT would not require Adrian and Francis to furnish personal guarantees as a condition of SGBT forbearing to enforce its rights against Agus. Consequently, SGBT's representatives sent a draft "Forbearance Agreement" to Ng, for execution by Agus, Adrian, Francis, SITPL and SSTPL.

Accompanying the draft Forbearance Agreement were security documents effecting mortgages over the four properties in favour of SGBT. Despite SGBT's in-principle agreement, the security documents for the Devonshire Properties contained a clause by which the mortgagors (*ie*, Adrian and Francis) personally covenanted to meet Agus' liability to SGBT (the "Clause").

Ng overlooked the Clause and, without commenting upon it, forwarded the draft Forbearance Agreement and accompanying security documents to Agus' office. Adrian and Francis subsequently executed the relevant security documents.

Agus defaulted on his obligations, and SGBT sued Adrian and Francis for payment under the Clause. SGBT's action was eventually settled for S$1m.

III. The Claim

Adrian and Francis then sued the defendants to recover the S$1m settlement payment on the basis that Ng had been negligent in allowing the Clause to be included in the security documents without explanation.

The claim was fought on the basis of both contract and tort. Adrian and Francis alleged that there was an implied contractual retainer between them and the defendants, which the latter had breached. The same facts were also alleged to give rise to the existence and breach of a tortious duty of care.

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[7] *Anwar*, *supra* note 1 at para 15.

IV. The Decision

At first instance, the claim was dismissed on both grounds.[8] The High Court considered that Adrian and Francis were merely nominees for Agus, who was the sole client of Ng, as it was Agus alone who gave instructions throughout the negotiations with SGBT. Concomitantly, it was held that Ng did not owe Adrian and Francis a duty of care in tort.

The Court of Appeal allowed the appeal by Adrian and Francis on the short point that, although Ng had not directly advised Adrian and Francis, as he had signed off on the Certificate of Correctness in the security documents as "solicitor for the mortgagors", there was thus an implied retainer between them and Ng for the specific purpose of acting as their solicitor in the mortgaging of the Devonshire Properties.[9]

V. The Obiter Dicta

It was thus strictly unnecessary to consider any possible tortious duty of care owed by the defendants. Nonetheless, the majority of the judgment was devoted to exploring this issue, on the basis that the cause of action in tort presented "novel and intricate questions of law in the Singapore context".[10]

White was treated as the leading authority in this regard. In *White*, a testator's existing will made no provision for the plaintiffs, his two daughters. However, the testator then sought to make a new will which included bequests of £9,000 to each daughter, and he instructed the defendant solicitors to implement his instructions. Owing to the defendants' dilatoriness, no new will was executed prior to the testator's death, with the result that the plaintiffs did not inherit the £18,000. The plaintiffs sued the defendants in negligence and the House of Lords held by a bare majority (Lord Keith of Kinkel and Lord Mustill dissenting) that, in such circumstances, the defendants owed a duty of care to the plaintiffs.

As recognised in *Anwar*, *White* has always been a problematic decision. One major difficulty is how the duty of care in *White* could be said to be consistent with the principles laid down in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*.[11] As explained in *Anwar*, it is often difficult to say that in performing services for his client there is a direct "assumption of responsibility" by the solicitor to a third party, and that the latter has relied on the solicitor taking due care in the performance of such services, within the meaning of *Hedley Byrne*.[12]

Thus, in *White*, Lord Goff of Chieveley conceded that *Hedley Byrne* was not directly applicable, but stated instead that the solicitor's assumption of responsibility to his client "should be held in law to extend"[13] to the third party.

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8 See *Anwar Patrick Adrian v Ng Chong & Hue LLC* [2013] SGHC 202.

9 *Anwar*, *supra* note 1 at para 53.

10 *Ibid* at para 61. It is, with respect, questionable whether that was either a sufficient or appropriate basis upon which to explore the matter in such detail.

11 [1964] 1 AC 465 (HL) [*Hedley Byrne*].

12 *Anwar*, *supra* note 1 at para 89.

13 *White*, *supra* note 2 at 268.

The actual outcome in *White* was in fact the same as that in *Ross v Caunters*,[14] where solicitors in preparing a will for a client carelessly failed to warn the client that the will should not be witnessed by the spouse of a beneficiary. In the event, it was so witnessed, causing the gift to the beneficiary to fail, and the beneficiary sought damages against the solicitors.

Sir Robert Megarry VC held that the solicitors owed a duty of care to the beneficiary, but purported to do so on a straightforward application of *Donoghue v Stevenson*[15] and *Hedley Byrne*.[16] As noted in *Anwar*, this analysis did not find favour in *White*. This was in no small part because, when *Ross* was decided, the test for the existence of a duty of care in negligence was governed by *Anns v Merton London Borough Council*,[17] whereas, by the time of *White*, it had been replaced by the tripartite test in *Caparo Industries plc v Dickman*.[18]

White was subsequently approved by a majority of the High Court of Australia (McHugh J dissenting) in *Hill v Van Erp*,[19] where, on facts similar to *Ross*, a duty of care was recognised as owed by the negligent solicitor to the disappointed beneficiary.

Anwar, while not a "disappointed beneficiary" case,[20] is similar to *White*, *Ross* and *Hill* in seeking to determine when, if at all, a solicitor will owe a duty of care to a third party in the course of carelessly performing services for his client. In addressing that question, the Court of Appeal in *Anwar* first knocked down a straw man, then dropped tantalising but ultimately unresolved remarks about the nature of the liability in such situations. Finally, in locating the duty of care within the *Spandeck* framework, broad statements were made which may have significant implications for contract and tort law.

A. *The Straw Man*

The Court of Appeal began its analysis of *White* by noting that the leading speech of Lord Goff is ambiguous as to which of two possible interpretations is the correct understanding of the nature of the duty of care established in *White*:

(1) The solicitor owes a direct duty of care to the third party in addition to the duty of care owed by him to his client; or
(2) The solicitor owes a duty of care only to the client, which is enforceable by the third party.

That seems a curious observation given that the plaintiffs' claim in *White* was dismissed at first instance on the basis that "the defendants owed no duty of care to the plaintiffs".[21] Counsel clearly argued for the existence of a "duty to the plaintiff"

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[14] [1980] 1 Ch 297 (Ch) [*Ross*].
[15] [1932] 1 AC 562 (HL).
[16] See *AEL*, *supra* note 5 at para 49.
[17] [1978] 1 AC 728 (HL) [*Anns*].
[18] [1990] 2 AC 605 (HL) [*Caparo*]. There was an explicit reference to *Anns* being "no longer the law" and to a "different legal climate" in Lord Mustill's dissent in *White*, *supra* note 2 at 283.
[19] (1997) 188 CLR 159 (HCA) [*Hill*].
[20] See *AEL*, *supra* note 5 at para 58. By contrast, *AEL* was such a case, as there the defendant solicitors had carelessly allowed a will to be executed in the presence of only one witness, causing the will to fail, thereby frustrating the testator's intention to benefit the plaintiffs, who then sued the defendants.
[21] *White*, *supra* note 2 at 212.

before the English Court of Appeal[22] and the House of Lords,[23] and that was how the matter was approached by the House of Lords.[24]

As noted in *Anwar*, however, the second interpretation of *White* has sometimes been espoused, as in *X v Woollcombe Yonge*.[25] However, the analysis of *White* in *X* is questionable. For instance, Neuberger J referred to the fact that, in *White*, Lords Keith and Mustill considered that no duty of care was owed by the solicitor to the intended beneficiary.[26] As their Lordships in fact determined that the intended beneficiary had no remedy in tort at all against the solicitor, however, that is clearly not support for the second interpretation of *White*.

Neuberger J also thought it relevant that Lord Goff rejected as inappropriate "an ordinary action in tortious negligence on the lines proposed by Sir Robert Megarry V-C in [*Ross*]".[27] As explained, however, Lord Goff was merely rejecting the analytical route by which *Ross* arrived at the same outcome (that a careless solicitor owes a duty of care directly to a disappointed beneficiary) and not the outcome itself.

The judgment of Chadwick LJ in *Worby v Rosser*[28] was also cited[29] as support for the "second interpretation" of *White*. However, Chadwick LJ was merely describing the potential lacuna confronting the House of Lords in *White*, namely, that a breach of the duty of care owed by a solicitor to a testator might go unremedied because the person on whom the loss falls is apparently owed no similar duty.[30]

Admittedly, Chadwick LJ noted Lord Goff's analysis in *White* of "the conceptual difficulties of imposing duties on a solicitor retained by a testator which can be said to be owed directly to the beneficiaries".[31] However, this is consistent with Lord Goff's criticism of the approach in *Ross*, with Lord Goff concluding (perhaps optimistically) that, by "extending" the *Hedley Byrne* principle of "assumption of responsibility", such conceptual difficulties would "fade innocuously away".[32]

The correct analysis of *White* was thus a straw man, especially as authority overwhelmingly favours the first interpretation,[33] and the parties in *Anwar* were in fact agreed that that was the proper analysis of *White*.[34]

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[22] *Ibid* at 213.

[23] *Ibid* at 246.

[24] *Ibid* at 251 (Lord Keith, dissenting); at 256, 259, 260, 262 (Lord Goff); at 276 (Lord Browne-Wilkinson); at 277, 290 (Lord Mustill, dissenting); and at 293 (Lord Nolan).

[25] [2001] Lloyd's Rep PN 274 (Ch) [*X*].

[26] *Ibid* at 277.

[27] *Ibid* at 278, citing *White*, *supra* note 2 at 267, 268.

[28] [1999] Lloyd's Rep PN 972 at 977 (CA) [*Worby*].

[29] See *X*, *supra* note 25 at 278 and *Anwar*, *supra* note 1 at para 97.

[30] That it seems unlikely for Chadwick LJ in *Worby* to have endorsed the "second interpretation" of *White* also seems clear given that, barely a year prior, his Lordship delivered the leading judgment in *Carr-Glynn v Frearsons* [1999] 1 Ch 326 (CA), which was cited in *Anwar*, *supra* note 1 at para 86, as "one of the clearest examples of the first characterisation [of *White*]".

[31] *Worby*, *supra* note 28 at 976.

[32] *White*, *supra* note 2 at 269.

[33] *Anwar*, *supra* note 1 at paras 85, 99.

[34] *Ibid* at para 83.

B. *The Tantalisation*

The Court of Appeal also suggested that the "second interpretation" of *White* could be approached as a matter of contract.

In doing so, *Anwar* has all but signalled the Court of Appeal's view that the third party in such situations would likely have, in effect, a directly enforceable remedy against the solicitor under the *Contracts (Rights of Third Parties) Act*.[35] Somewhat unsatisfactorily, however, the Court of Appeal ultimately shrank from this conclusion, suggesting that it was a matter for "another case with fuller arguments".[36]

Disappointingly, the Court of Appeal also discussed, but came to no firm view on, the application of the "narrow" and "broad" grounds in *Alfred McAlpine Construction Ltd v Panatown Ltd*.[37] The suggestion appears to be that in situations like *White*, the testator's estate is the proper plaintiff and may sue (on the third party's behalf) to recover damages representing the third party's loss (the "narrow ground") or (in the estate's own right) to recover damages representing its own loss (the "broad ground").

Interesting though all this may be, it is not apparent how the *CRTPA* or *Panatown* could have applied in *Anwar*.

As far as the *CRTPA* is concerned, in the "disappointed beneficiary" scenario it is at least arguable that the retainer between the solicitor and testator "purports to confer a benefit" on the intended beneficiary within the meaning of s 2(1)(b) of the *CRTPA*.[38] In *Anwar*, however, the retainer between Agus and Ng was for Ng to "(a) explain to Agus the contents of correspondence and proposals from SGBT and its lawyers and (b) advise Agus generally on the consequences of the contents".[39] Such a retainer cannot easily be seen as "purport[ing] to confer a benefit" on Adrian and Francis: it might perhaps be said that the retainer required Ng to effect a mortgage of the Devonshire Properties without exposing Adrian and Francis to any personal liability thereunder, but seeking to avoid a loss to and purporting to confer a benefit on a third party are not the same thing.

Similarly, the application of *Panatown* on these facts is not obvious. The "narrow ground" is concerned with the passing of title in property[40] and was clearly inapplicable. Further, even if the "broad ground" could have applied, that would have been useless to Adrian and Francis because it would simply have meant that they were the wrong plaintiffs since only Agus had standing to sue the defendants.

Thus, while tantalising, it is not entirely apparent where this aspect of *Anwar* leads.

C. *The Uncertainty*

The Court of Appeal also analysed whether, on the first interpretation of *White*, a tortious duty of care was owed directly by Ng to Adrian and Francis.

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[35] Cap 53B, 2002 Rev Ed Sing [*CRTPA*].

[36] *Anwar*, *supra* note 1 at para 110.

[37] [2001] 1 AC 518 (HL) [*Panatown*].

[38] See however *Anwar*, *supra* note 1 at para 106.

[39] *Ibid* at para 139.

[40] *Family Food Court v Seah Boon Lock (trading as Boon Lock Duck and Noodle House)* [2008] 4 SLR(R) 272 at para 58 (CA).

Clearly, for this purpose the Court of Appeal was determined to rationalise *White* within the *Spandeck* test, so as to scotch any suggestion that the *White* concept of "assumption of responsibility" is a legal test in and of itself, rather than merely a relevant factor to be taken into account under the first, proximity-based limb of *Spandeck*.[41]

What is less obvious is why such a clarification was necessary. In *Trans-World (Aluminium) Ltd v Cornelder China (Singapore)*,[42] in an action for negligent misstatement, the High Court considered that, applying the speech of Lord Browne-Wilkinson in *White*,[43] it was the defendant's assumption of responsibility *for the task to be performed by him* which established a "special relationship of *proximity*"[44] creating a duty of care.

While it was admittedly Lord Goff who delivered the leading speech in *White*, the Court of Appeal's explanation in *Anwar* of how Lord Goff's speech is to be understood is essentially identical to Lord Browne-Wilkinson's approach:

> It is this assumption of responsibility to the client *to perform the client's instructions* which confers a benefit or negatives a detriment to a third party and *which serves as the foundation for* the identification of *proximity to the third party* that justifies the imposition of a duty of care under the first stage of the *Spandeck* test.[45]

It is therefore curious why it should have been necessary to elaborate so substantially on what had already been established in *Trans-World*, but what may perhaps trouble future courts is the reasoning in and implications of *Anwar*.

Consistently with *Spandeck*, it was rightly noted that, to establish a duty of care, Adrian and Francis had to establish sufficient proximity between them and Ng.[46] While the necessary proximity was amply made out given the implied retainer between Ng and Adrian/Francis, the Court of Appeal also considered that, *even without* the implied retainer, there was nonetheless sufficient proximity.[47]

However, for this purpose, it was apparently insufficient for Adrian and Francis to show that Ng owed Agus a duty of care by reason only of the solicitor-client relationship between Ng and Agus.[48] This was perhaps rather surprising in the light of the Court of Appeal's pronouncement that:

> *Where a solicitor's instructions from a client include or has as its effect the conferment of a benefit or negativing a detriment to a third party, and the solicitor undertakes to the client to fulfil that instruction*, he would have brought himself

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41 See *Anwar*, *supra* note 1 at paras 92, 95, 160, 190.

42 [2003] 3 SLR(R) 501 (HC) [*Trans-World*].

43 *White*, *supra* note 2 at 273.

44 *Trans-World*, *supra* note 42 at para 130 [emphasis added].

45 *Anwar*, *supra* note 1 at para 157 [original emphasis removed; emphasis added]. See also *Anwar*, *ibid* at para 161: "Lord Goff's 'extension' of the *Hedley Byrne* basis of liability… is therefore, in our view, better explained by *an assumption of responsibility* (to the client) *that provides the foundation for proximity* between the solicitor and the third party" [emphasis added].

46 *Ibid* at para 144.

47 *Ibid* at para 146.

48 *Ibid* at para 144.

> into a direct relationship with the third party, even if the latter may not have personal knowledge of the transaction or the solicitor.[49]

Given that the retainer between Agus and Ng encompassed "negativing a detriment" to Adrian and Francis,[50] it is unclear why it was insufficient on the Court of Appeal's test for Adrian and Francis to simply point to the solicitor-client relationship between Ng and Agus.

More fundamentally, however, the *Anwar* test is extraordinarily broad, and has potentially dramatic consequences. In *Hill*, Gummow J considered that, on the facts, recognising a duty of care owed directly by the solicitor to the third party:

> [I]s by no means to espouse any general proposition to the effect that if A promises B to perform a service for B which B intends, and A knows, will confer a benefit on C if performed, A owes to C a duty in tort to perform that service with reasonable skill and care.[51]

In *White*, by contrast, Lord Mustill thought that recognising a duty of care would have such an effect.[52] For the reasons discussed below, it is doubtful if Lord Mustill's view was correct, but, at least where A is a solicitor, it would appear that the test in *Anwar* does espouse the general proposition that Gummow J rejected, namely, that A will indeed *always* owe C a duty in tort to perform the promised service with reasonable skill and care.

Furthermore, although the test in *Anwar* only applies with regard to solicitors, there is a real risk that it cannot in principle be restricted in that way. In contracting with his client to perform the requested services, the lawyer essentially becomes the client's fiduciary and agent. Without adequate limiting factors, the test in *Anwar* could thus extend to any fiduciary, agency or contractual relationship, thereby vastly expanding the tort of negligence.

A similar view has sometimes been taken of *White*,[53] and, indeed, under English law the liability created by *White* is not restricted merely to solicitors.[54] Having said that, however, there were in fact significant features in *White* and *Hill* which contained the liability created in those cases, but which were arguably given insufficient prominence in *Anwar*.

First, in *White*, Lord Nolan emphasised the fact that the defendant solicitors' proximity to the plaintiff beneficiaries was extremely close. The solicitors were "acting in the role of family solicitors",[55] in circumstances where one of the plaintiffs had personally spoken to the solicitors about the testator's revised wishes, and the letter setting out those wishes was in fact written for the solicitor by the husband of the other plaintiff.[56]

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[49] *Ibid* at para 146 [emphasis added].
[50] See text accompanying *supra* note 39.
[51] *Hill*, *supra* note 19 at 235.
[52] See *White*, *supra* note 2 at 283, 289.
[53] Tony Weir, "A Damnosa Hereditas?" (1995) 111 LQR 357 at 361.
[54] See *Gorham and others v British Telecommunications Limited plc and others* [2000] 1 WLR 2129 (CA).
[55] *White*, *supra* note 2 at 294.
[56] *Ibid* at 295.

Secondly, for that reason, Lord Nolan considered it "absurd"[57] to say that there was no reliance by the plaintiffs on the solicitor carrying out his duties carefully, precisely because the solicitor knew what it was that they were expecting him to do.

It is not entirely clear to what extent such matters were given adequate weight in *Anwar*. On the one hand, the Court of Appeal appears to have considered that the requisite circumstantial proximity was made out merely because "[t]he client's wish to benefit the third party can only be effected through the solicitor's careful performance of his legal services to the client".[58] If that is all that is required, however, then the principle cannot be limited to solicitors: wherever B wishes to benefit C through the agency of A, this can only be effected through the careful performance of A's services to B.

On the other hand, the Court of Appeal referred to Ng's knowledge that his services were retained in part to take care of the interests of Adrian and Francis, that they were young and subservient to Agus' wishes, and that Agus was concerned that they should not personally guarantee his debts.[59] In addition, the Court of Appeal pointed out that Adrian and Francis, who knew that Ng was advising Agus, were known to Ng.[60] It might perhaps be said that Ng was thus "acting in the role of family solicitors" for Agus and his sons.[61]

Yet, in examining these factors, the Court of Appeal merely considered that "Ng's particular knowledge of the state of affairs at play *supports* a finding of proximity",[62] suggesting that, in contrast to Lord Nolan's approach, knowledge is not crucial to such a finding. Further, it was made explicit in *Anwar* that reliance on the solicitor by the third party "plays no part in this analysis";[63] indeed, the third party need not even be aware of either the transaction or the solicitor.[64]

What is perhaps most alarming is the view that there was causal proximity because "Ng was plainly cognisant of the direct repercussions of his actions, or inaction, on [Adrian's and Francis's] interests".[65] As the Court of Appeal frankly acknowledged, "causal proximity might on this reasoning be found in all such tripartite situations".[66] Yet, the Court of Appeal considered such generic causal proximity enough, *on its own*, to found the requisite duty of care.[67] Thus, it seems that as long as A knows that careless performance of his agreement with B will lead to loss to C, proximity is thereby created between A and C.

Thirdly, in *White*, Lord Browne-Wilkinson stressed, not the third party's reliance upon the solicitor as such, but the dependency of the third party's economic well-being upon the solicitor's careful performance of his responsibilities.[68] As explained

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[57] *Ibid*.

[58] *Anwar*, *supra* note 1 at para 147.

[59] *Ibid* at para 148.

[60] *Ibid* at para 151. With respect, the Court of Appeal is however incorrect to suggest a contrast with *White* on the basis that in *White* the solicitor knew of the intended beneficiaries but that the converse was not true: see text accompanying *supra* note 56.

[61] See for instance *Anwar*, *ibid* at para 55.

[62] *Ibid* at para 148 [emphasis added].

[63] *Ibid* at para 161.

[64] See text accompanying *supra* note 49.

[65] *Anwar*, *supra* note 1 at para 149.

[66] *Ibid*.

[67] *Ibid* at para 150.

[68] *White*, *supra* note 2 at 275.

by Brennan CJ in *Hill*, that makes sense in a transaction such as drafting a will, the entire point of which is to allow the testator to benefit nominated third parties.[69]

By contrast, in *Anwar*, it is uncertain whether this consideration was viewed as being very important. It is true that the Court of Appeal thought Adrian and Francis "young" and "relatively vulnerable", that Adrian and Francis "depended" on Ng to perform his duties to Agus, and described the matter as Ng's "capacity… to control the situation that might give rise to the risk of harm".[70] Yet, it is debatable whether Adrian and Francis were particularly vulnerable: Adrian was already working and was the sole director-shareholder of companies holding substantial real property, Francis was studying abroad, and, again, Ng was only "in complete control" over them[71] in the rather anodyne sense that C is only likely to suffer loss if A carelessly performs his contract with B. Admittedly, Adrian and Francis were said to be "subservient" to Agus' wishes,[72] and appear to have held the relevant properties only as nominees for Agus. Even so, "vulnerability" is normally measured by the victim's inability to protect himself against the *tortfeasor's* carelessness due to the latter's unusual dominance and/or the victim's particular weakness or impaired autonomy, as with pupils and teachers or wards and guardians.[73] Thus, it is questionable whether on this measure, Adrian and Francis ought to be regarded as "vulnerable" simply because they were obedient sons. In other words, Adrian and Francis may have been "vulnerable" vis-à-vis Agus, but it is not obvious that they were "vulnerable" vis-à-vis Ng, which ought to have been the relevant enquiry.

More crucially, however, unlike a will, the relevant transaction in *Anwar* was not entered into for the *specific* purpose of benefitting Adrian and Francis. It was entered into for the primary purpose of benefitting Agus, albeit with a collateral intention of being structured so as to prevent loss to Adrian and Francis. Under the Court of Appeal's test, however, that does not seem to matter: proximity is created where the transaction "include[s] or has as its effect"[74] the conferment of a benefit on or the avoidance of loss by a third party.

Furthermore, in every case where A agrees with B that A will perform a service for B that benefits C, A arguably has the "capacity to control the situation that might give rise to the risk of harm"[75] because C's benefit depends entirely on A's proper performance. Likewise with the somewhat circular idea that the solicitor should have "undertake[n] to the client to fulfil [his] instruction":[76] in contracting with B, A obviously undertakes to perform his side of the bargain.

Fourthly, in *White*, Lord Browne-Wilkinson considered it "fair, just and reasonable" within the third limb of the *Caparo* test to impose such a duty of care on

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[69] *Hill*, *supra* note 19 at 167. See also *Hill*, *ibid* at 186 (Dawson J), at 233 (Gummow J), as well as *AEL*, *supra* note 5 at para 83.

[70] *Anwar*, *supra* note 1 at para 154, citing David Tan and Goh Yihan, "The Promise of Universality—The *Spandeck* Formulation Half a Decade on" (2013) 25 Sing Ac LJ 510 at 530, 531.

[71] *Anwar*, *ibid*.

[72] *Ibid* at para 148.

[73] See *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 290 at 406 (HCA) (Gummow, Heydon and Crennan JJ).

[74] See text accompanying *supra* note 49.

[75] See text accompanying *supra* note 70.

[76] See text accompanying *supra* note 49.

solicitors drawing up wills as: "the proper transmission of property from one generation to the next is dependent upon the due discharge by solicitors of their duties… society as a whole does rely on solicitors to carry out their will making functions carefully".[77]

Two points may be made about this. First, conceptually, such explicit policy-based reasoning was permissible in *White* precisely because the *Caparo* test requires *positive* policy considerations to found a duty of care. By contrast, that should not have been a weighty consideration in *Anwar* because the *Spandeck* test generally only allows *negative* policy factors to be legally relevant in contradicting a *prima facie* duty of care.[78] Secondly, in *White*, *Hill* and *AEL*, wills were singled out for special treatment,[79] because of:

(1) Their unique function in effecting testamentary dispositions,[80] which is particularly important to "people of modest means, who need the money so badly"[81] and suffer the most when a will is defective; and
(2) The fact that an error in the will cannot generally be discovered by anyone other than the solicitor or the client (who, often being elderly or infirm, can hardly be expected to review the will for legal defects), and is often only discovered upon the client's death, by which time it is too late to correct.[82]

On the facts of *Anwar*, the transaction had none of the indicia identified in *White* and *Hill*. The matter concerned no inter-generational transfer of wealth from Agus to Adrian and Francis but instead concerned the suspension of Agus' multi-million dollar liability to SGBT. Adrian and Francis were not improvident but were wealthy scions who (unlike intended beneficiaries) could have retained their own solicitors.

Further, as the Court of Appeal itself recognised, the Clause was "quite difficult to miss".[83] On a matter so vital to their commercial interests, Adrian and Francis could (and should) have perused the documents carefully for themselves and queried Ng on any clause which appeared out of place. Indeed, even after the documents had been signed, the mistake might still have been discovered, and the Forbearance Agreement amended or rectified.

Yet, the Court of Appeal in *Anwar* did not see "any generally applicable policy reason" to negate a duty of care, and instead appeared to have considered, as a

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[77] *White*, *supra* note 2 at 276. *White*, *ibid* at 260 (Lord Goff) was to similar effect, as were Dawson and Gummow JJ in *Hill*, *supra* note 19 at 185, 186 (Dawson J) and 223, 224 (Gummow J).

[78] *Animal Concerns Research & Education Society v Tan Boon Kwee* [2011] 2 SLR 146 at para 77 (CA) [*Animal Concerns*]. It is true that the Court of Appeal noted in that case that positive policy factors can still be considered under the *Spandeck* test, but this was said to be for the forensic purpose of rebutting spurious negative policy factors raised by a defendant, and not as normative considerations in their own right.

[79] See *AEL*, *supra* note 5 at para 99.

[80] *White*, *supra* note 2 at 276 (Lord Browne-Wilkinson).

[81] *Ibid* at 260 (Lord Goff).

[82] *Hill*, *supra* note 19 at 186 (Dawson J) and *AEL*, *supra* note 5 at para 189. The facts of *AEL* illustrate vividly the difficulty of remedying such an error: the failure of the will in that case meant that the testator's estate was to be distributed according to the intestacy rules, resulting in a windfall for a number of family members who had not been named in the will (the "Unintended Beneficiaries"). Despite the plaintiffs' best efforts, the Unintended Beneficiaries in *AEL* could not be persuaded to relinquish their entitlements in favour of the plaintiffs in accordance with the testator's intentions as expressed in the defective will (see *AEL*, *ibid* at paras 123-125).

[83] *Anwar*, *supra* note 1 at para 180.

positive policy factor, that imposing a duty of care on solicitors in favour of third parties advances the "desirable policy" that a noble legal profession should strive to uphold "high standards of competence and diligence".[84] To the extent that *Spandeck* allows this, as Lord Mustill countered in *White*, "[t]he purpose of the courts when recognising tortious acts… is to compensate those plaintiffs who suffer actionable breaches of duty, not to act as second-line disciplinary tribunals imposing punishment in the shape of damages".[85] Furthermore, on that basis there is no reason why the line should (or can) be drawn at solicitors: competence and diligence should be encouraged on the part of all who agree to perform services for others.

In the result, therefore, *White* and *Hill* contain within them a number of inherent control mechanisms delimiting the novel duty thereby created. For those reasons, Lord Goff in *White* considered the duty of care to arise only "exceptionally",[86] and, as seen, Gummow J in *Hill* did not think that the decision in *Hill* espoused any "general proposition"[87] which might threaten privity of contract.

By contrast, the test in *Anwar* was not regarded by the Court of Appeal as being particularly exceptional, and endorses an even broader proposition than that mooted by Gummow J, requiring neither intention by B nor knowledge by A that the agreement between them *will* benefit C, but merely one which "include[s] or has as its effect the conferment of a benefit or negativing a detriment to a third party".[88]

Such a formula would seem to outflank the doctrine of privity, and it is surprising that that alone was not regarded as a negative policy factor warranting further discussion. As noted by Gummow J in *Hill*, whatever criticisms might be made of privity, there remains a "sensible concern not to allow every breach of contract to generate a tort claim by any third party who had an interest in the performance of that contract".[89]

Likewise, Lord Goff in *White* thought that the "simplest course" was to give the disappointed beneficiary a direct contractual right against the negligent solicitor, but his Lordship considered that this could only be done by the Legislature.[90] It is therefore questionable whether *White* might have been decided the same way had the English equivalent of the *CRTPA* then been in force.

Now that Parliament has enacted the *CRTPA*, one wonders why the exceptional remedy in *White* should be accepted as legitimate authority for the much broader approach in *Anwar*. Naturally, it may be that Adrian and Francis could not have relied on the *CRTPA*,[91] but if so, why should they have a tortious remedy going beyond the limited contractual solution provided by Parliament? In *Animal Concerns*, the Court of Appeal suggested that the fact that an Act of Parliament does not cover a particular situation is "equally, if not more, consistent with the possibility that there is a lacuna in the law the courts should remedy".[92] That was said, however, in

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[84] *Ibid* at para 166. Similar views were expressed in *AEL*, *supra* note 5 at paras 97, 98.
[85] *White*, *supra* note 2 at 278.
[86] *Ibid* at 259.
[87] See text accompanying *supra* note 51.
[88] See text accompanying *supra* note 49.
[89] *Hill*, *supra* note 19 at 225, citing Jane Stapleton, "Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence" (1995) 111 LQR 301 at 324.
[90] *White*, *supra* note 2 at 266.
[91] See text accompanying *supra* note 39.
[92] *Animal Concerns*, *supra* note 78 at para 81.

the context of an area where the legislative provision in question[93] clearly had *not* occupied the relevant field, and indeed the Court of Appeal indicated in the same passage that, where Parliament had specifically changed the law so as to introduce a contemplated remedy, the courts ought not to be astute to create liabilities extending beyond Parliament's intention.[94]

The *CRTPA* would seem to be a paradigm example of Parliament changing the law to introduce a particular remedy, which the liability introduced in *Anwar* may well undercut. Under the *CRTPA*, the term sought to be enforced must purport to confer a benefit on the third party (s 2(1)(b)), and is not enforceable by the third party if on the contract's true construction the parties did not intend it to be (s 2(2)). Also, the party against whom enforcement is sought is protected from double liability (s 6), and third parties cannot enforce against employees any term of an employment contract (s 7(3)).

The approach in *Anwar*, however, does not only apply where an agreement between A and B purports to confer a benefit on C, but also applies where the agreement includes or has the effect of negativing a loss to C. On that basis, it seems irrelevant that A and B did not intend C to enforce a term which benefits him, as long as what he seeks to enforce can be framed as an obligation of skill and care. Nor, seemingly, would it matter that the contract between A and B is an employment contract: although the test in *Anwar* only applies in terms to solicitors and clients, the solicitor-client relationship creates an agency relationship just as an employment contract does, and, as explained, little in *Anwar* seems to turn specifically on features unique to the solicitor-client retainer.

Furthermore, under *Anwar*, A is potentially exposed to double liability (contractual liability to B and tortious liability to C), which he would have avoided if C was confined to a remedy under the *CRTPA*. It is not to the point to say that B's damages will be nominal if he suffers no loss, or that C's loss is somehow merely "reflective" of B's loss.[95] Under the approach in *Anwar*, the harm suffered or benefit lost by C seems clearly separate from (and therefore not reflective of) the equally substantive loss of contractual performance suffered by B under the "broad ground" in *Panatown*.

VI. Conclusion

Given the Court of Appeal's decision on the implied retainer point, it is tempting to suggest that *Anwar* is not binding authority on any matters concerning *White*, particularly given the Court of Appeal's suggestion that the proper interface between contract and tort might benefit from further consideration.[96] However, it appears

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[93] Section 10 of the *Building Control Act* (Cap 29, 1999 Rev Ed Sing).

[94] Particular reference was made to the situation in England, where the passage of the *Defective Premises Act 1972* (UK), c 35 [*DPA*] (which specifically catered to the situation of defective premises and the liabilities of builders therefore) was treated by the House of Lords in *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL) as a highly persuasive policy reason to decline to impose a common law duty on builders or local authorities going beyond the statutory liabilities created by the *DPA*.

[95] Along the lines of the "reflective loss" principle in company law: see *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] 1 Ch 204 (CA).

[96] *Anwar*, *supra* note 1 at para 110.

that the Court of Appeal intended also to base its decision on tortious reasoning.[97] In any event, the lengthy discussion clearly represents the Court of Appeal's considered view on *White*, with the intention of providing authoritative guidance for the future.[98] That it has been so treated is evident from *AEL*, which relied heavily on the authority of *Anwar*, although the High Court in the recent case of *Chu Said Thong and another v Vision Law LLC* has regarded the discussion of *White* in *Anwar* as being only *obiter dicta*.[99]

Nonetheless, for the reasons given, *Anwar* may have potentially far-reaching consequences, with the result of introducing considerable uncertainty not merely as to the ambit of the tort of negligence, but also the continued relevance of privity of contract.

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[97] *Ibid* at para 211.
[98] *Ibid* at para 84.
[99] [2014] 4 SLR 375 at para 217 (HC).