Experts in Contentious Probate Cases

Adam Carvalho 15 August 2016

"Experts built the Titanic"
Caller to Jeremy Vine

Earlier this year, Henry kindly asked me to give a talk on the subject of experts in contentious probate cases. Shortly after giving my talk, in the course of the Brexit referendum, the word "expert" started to acquire rather negative connotations with (for example) Michael Gove saying "*I think people in this country have had enough of experts*".

As ACTAPS members will be aware, experts are frequently instructed in contentious probate cases, and their importance in such cases is likely to have been unaffected by the statements of Messrs Gove and Johnson. This article sets out when one might instruct an expert in contentious probate cases, and some procedural considerations.

1. What is an expert witness, and when might one instruct an expert in a contentious probate case?

The British Medical Association provides a pithy working definition: "*a person who is qualified by his or her knowledge or experience to give an opinion on a particular issue(s) to a court*" (BMA Expert Witness Guidance, October 2007) . An expert witness's duty is to the Court. This duty overrides any obligation to the person from whom experts have received instructions, or by whom they are paid (Civil Procedure Rule ("CPR" 35.3).

As the ACTAPS Code sets out, expert evidence appropriate to probate and trust disputes may include, in particular:

i. "*medical*": for example, evidence as to testamentary capacity, or evidence about mental state in relation to claims regarding knowledge and approval or undue influence;

ii. "*handwriting*": evidence regarding whether wills, trust deeds and other related documents were executed by the person purported to be the signatory;

iii. "*valuation*": for example in relation to disputes regarding executors' accounts, maladministration issues or chattel disputes;

iv. "*tax related or actuarial*".

2. Should an expert be instructed?

No party may call an expert, or put in evidence an expert's report, without the Court's permission (CPR 35.4(1)). The CPR restricts expert evidence to "*what is reasonably required to resolve the proceedings*" (CPR 35.1). The Chancery Guide offers some clarification as to when the Court might give such permission. The key question to answer is: "*what added value [expert] evidence will provide to the court in its determination of a given case*" (Chancery Guide, October 2013, paragraph 4.8).

A few recent will validity judgments provide a useful illustration of these principles.

In *Hawes v Burgess* [2013], Mummery LJ questioned the value that can be added by experts in certain cases: "*the court should be cautious about acting on the basis of evidence of lack of capacity given by a medical expert after the event, particularly when that expert has neither met nor medically examined the testatrix, and particularly in circumstances when that expert accepts that the testatrix understood that she was making a will and also understood the extent of her property*."

In a similar vein, in *Cowderoy v Cranfield* [2011], Morgan J noted that "*as neither psychiatrist had ever had the opportunity of seeing Mrs Blofield, neither was in a position to give me a direct psychiatric appraisal at any point in time, let alone on the day Mrs Blofield executed the disputed will*" (though the psychiatric evidence was of use to him in relation to a number of other issues in the trial).

Notwithstanding these notes of caution, expert evidence will often be obtained in validity claims from a psychiatrist (usually specialising in old age psychiatry). Two recent cases provide an illustration of the importance of such experts in relation to validity claims.

In *Key v Key* [2010] the Claimants, Richard and John Key, sought declarations that the last will of their late father George ought not to be admitted to probate. The brothers' position was that their father had lacked capacity to make validly his final will. The claim was defended by the testator's daughters, Jane Key and Mary Boykin.

Briggs J found that the will draftsman had accepted instructions to draw up a will for George, who was 89, without carrying out a *Banks v Goodfellow* assessment. George was not only elderly, but his wife of 65 years had died only a week or so before the will was drafted. The question was whether the effects of George's grief were sufficient to deprive him of capacity.

After hearing expert medical evidence from two experts, Briggs J found that:

"*As the expert evidence in the present case confirms, persons with failing or impaired mental faculties may, for perfectly understandable reasons, seek to conceal what they regard as their embarrassing shortcomings from persons with whom they deal, so that a friend or professional person such as a solicitor may fail to detect defects in mental capacity which would be or become apparent to a trained and experienced medical examiner to whom a proper description of the legal test for testamentary capacity had first been provided...*"

George's grief constituted an "*affective disorder which occurred before the making of the [disputed] 2006 Will*." His grief could, therefore, have impaired his testamentary capacity.

Briggs J went on to state that: "*Dr Hughes' evidence, based on his own detailed psychiatric examination of Mr Key conducted within five months of the relevant event, was powerfully supportive of the view that he lacked testamentary capacity in December 2006*". He went on to say that: "*The preponderant weight of the evidence suggesting that Mr Key was devastated, rather than merely upset, by his wife's death, leads me to the conclusion that, in the words of Erskine J in Harwood v. Baker (supra) at page 297, Mr Key was "incompetent to the exertion required" for the purpose of making an important decision as to the disposition of his property upon his death*".

The result was (arguably) a development of the *Banks v Goodfellow* test (such that it should now take into account the decision making powers of the testator and not just their comprehension) and George Key's final will was declared invalid. Clearly the psychiatric evidence was of significant use to the Briggs J in reaching his judgment.

In *Kostic v Chaplin* [2007] Bane Kostic had made two wills (one in 1971, and one in 1974) and a codicil (in 1984). His entire estate was to be left to his son, Zoran. Subsequently, in 1988 and 1989, Bane changed his wishes and left his entire estate (worth around £8.2m) to the Conservative Party Association ("CPA").

From the mid-1980s, Bane had suffered from a delusional disorder. He believed that dark forces were conducting a sinister and organised conspiracy against him. He was convinced that only the Conservative Party, acting through Margaret Thatcher, could save the country:

"Our Maggie is not only our dear PM – she is really today the leader of the free world and we must support her unconditionally to enable her vision and charisma to save and protect our dignity, decency, democracy and freedom".

Zoran claimed that the 1988 and 1989 wills were invalid on the ground of a lack of testamentary capacity. Henderson J agreed: "*I am fully satisfied on the basis of all the evidence that Bane's decision to disinherit Zoran in the 1988 and 1989 Wills was heavily influenced by his delusions, and in particular by his belief that Zoran was implicated in a global conspiracy he saw around him*." The 1988 and 1989 wills were found to be invalid.

The costs order is of interest. As readers will be aware, in probate cases two exceptions to the usual rule on costs survived the introduction of the CPR: (i) if a testator, or residuary beneficiaries, are the cause of or responsible for the litigation, then costs may come out of the estate; and (ii) if the circumstances lead reasonably to an investigation of the matter, costs may be left to be borne by those who incurred them.

Henderson J ordered that:

"*…leaving aside for the moment the state of knowledge of the CPA, it seems to me that in the highly unusual circumstances of the present case Bane's conduct may properly be regarded as the primary cause of the issue between Zoran and the CPA as to whether he had testamentary capacity when he made the 1988 and 1989 wills.*

In my view, the cut-off date for payment of the CPA's costs out of the estate should be fixed at a fairly early stage in the litigation, when the nature of Zoran's case and the evidence in support of it had been explained to the CPA, and the CPA had had an adequate opportunity to consider its position, to gather information, and to decide whether or not to contest the proceedings" (emphasis added).

As the above cases demonstrate, expert evidence is likely to play a central role in supporting or rebutting a claim regarding lack of testamentary capacity and also, potentially, in determining the subsequent cost order.

Finally – in relation to professional negligence claims – it should be noted that it will usually be inappropriate to allege professional negligence without "*expert input*" to support the allegation (*Pantelli Associates Ltd v Corporate City Developments Number Two Ltd* [2010]) from the defendant's peers (*Caribbean Steel Co Ltd v Price Waterhouse* [2013]). However, expert evidence on the duties of a solicitor is usually not admissible as it is considered to be a matter for the Court to determine. The exception is that "*expert evidence is admissible to prove some 'practice in a particular profession, some accepted standard of conduct which is laid down by a professional institute or sanctioned by common usage*'" (*Football League Ltd v Edge Ellison (A Firm)* [2007]). The more specialised a lawyer's area, the more likely the Court will expect to see an expert report on the nature of the duties (s)he owed.

3. One expert, or more?

The CPR states that where possible matters requiring expert evidence should be dealt with by only one expert (CPR PD35 paragraph 1). The ACTAPS Code "*encourages joint selection of, and access to, experts. However, it maintains the flexibility for each party to obtain their own expert's report. It is for the Court to decide whether the costs of more than one expert's report should be recoverable*." See the ACTAPS Code for a suggested protocol in relation to this point.

The Chancery Guide offers the following warning: "*it is not necessarily a sufficient objection to the making by the court of an order for a single joint expert that the parties have already appointed their own experts. An order for a single joint expert does not prevent a party from having their own expert to advise them, but they may well be unable to recover the cost of employing their own expert from the other party*" (Chancery Guide, October 2013, paragraph 4.13).

There are though, risks to agreeing a single joint expert. These risks include: (i) that the expert will essentially decide the relevant issues without any opposing view or challenge; and (ii) that neither side can interview the expert without the other side's representatives being present – thus preventing each side establishing the merits of their position fully. The author's experience is that in probate claims parties tend to appoint their own expert, and this is supported by the relevant case law.

4. Instructing the expert

Before written instructions are prepared, consideration can be given to the following means of obtaining information:

- making a *Larke v Nugus* request to the will draftsman (see below);
- making a joint application for medical records (as recommended by the ACTAPS Code);
- applying for records under the Access to Health Records Act 1990 (see below);
- a subject access request under the Data Protection Act 1998 (see below);
- obtaining statements from the client, their relatives and friends; and
- collating any other relevant documents in the client's possession.

4.1 *Larke v Nugus*

A will draftsman's duty of confidentiality continues at the end of the retainer and passes on to the personal representatives. This means that consent of the PRs is required before records may be released (which may not be available before the grant has been issued). However:

"*Where a serious dispute arises as to the validity of a will, beyond the mere entering of a caveat and the solicitor's knowledge makes him or her a material witness, then the solicitor should make available a statement of his evidence regarding the execution of the will and the circumstances surrounding it to anyone concerned in the proving or challenging of that will, whether or not the solicitor acted for those who were propounding the will*." (Law Society's advice, confirmed and upheld by the Court of Appeal in *Larke v Nugus* [1979]).

The justification for this is that in any event the Court has the power (under the Senior Courts Act 1981 and under the CPR) to order such disclosure. The draftsman should, therefore, make available any relevant materials in order to avoid an unnecessary application to the Court. There is a practical benefit as well; as the Law Society's guidance states: "*providing this information promptly when a will is initially challenged may dispel suspicions and save costs in the long run*" (Disputed Wills (6 October 2011)).

4.2 Access to Health Records Act 1990

Section 3(1) (f) of the Access to Health Records Act 1990 provides that: "*An application for access to a health record, or to any part of a health record, may be made to the holder of the record by … (where the patient has died) the patient's personal representative and any person who may have a claim arising out of the patient's death*".

Section 1(1) states that "*Health Record*" means a record which: *"(a) consists of information relating to the physical or mental health of an individual who can be identified from that information, or from that and other information in the possession of the holder of the record; and (b) has been made by or on behalf of a health professional in connection with the care of that individual*".

4.3 Data Protection Act 1998

The Data Protection Act 1998 allows individuals to obtain a copy of "*personal data*" (as defined in the Act) from a "*data controller or any other person* ". The recent judgment in *Dawson-Damer v Taylor Wessing* [2015] appears to have curtailed the ability of applicants to obtain information for use in litigation – the purpose of the Act is not to

allow the "*discovery of documents that may assist… in litigation or complaints against third parties*". Further, following the judgment, it appears that data controllers need only conduct a "reasonable and proportionate" search.

However, the judgment does not sit entirely easily with other authorities (such as *In the Matter of Southern Pacific Personal Loans Limited* [2013] and *Durham County Council v Dunn* [2012]). The claimants were granted permission to appeal, so the position may change.

4.4 Providing guidance to the expert

The expert will require guidance on the legal framework within which they will need to operate. As readers will be aware, there has for some time been a debate as to whether the Courts ought to apply the test in *Banks v Goodfellow* or in the Mental Capacity Act 2005 when assessing testamentary capacity (and some have suggested that the 2005 Act merely updated the Banks test and put it on a statutory footing).

There are some important differences between the test in the 2005 Act and *Banks v Goodfellow*. Under the 2005 Act: (i) a person must be assumed to have capacity unless it is established that he lacks capacity; (ii) there is a requirement that the testator understand all information relevant to a decision; and (iii) there is a requirement that the testator understand the reasonably foreseeable effects of making the will.

Walker v Badmin [2014] confirmed that the relevant test for mental capacity is the one set out in *Banks v Goodfellow*. It remains to see whether a higher court might reach a different conclusion. In the meantime, it has been suggested that experts should be given both tests in their instructions and asked that both are considered.

5. Hot tubs

Finally, the recent "*Jackson reforms*" to the CPR introduced the rather unpleasant sounding concept of trial judges directing experts to "*hot tub*" with each other – or to provide their oral evidence concurrently. The parties agree an agenda, based upon the areas of disagreement in the experts' joint statements. The experts each take an oath, or affirmation, and then address the agenda items. The judge may initiate discussion by asking the experts, in turn, for their views and inviting the other expert to comment or ask questions of the first expert. The parties' representatives may also ask questions of the experts.

Jackson LJ is of the opinion that "*experience has shown that judges have gained much more assistance from experts by hearing evidence concurrently. The extent of disagreement has been reduced and the real issues have been identified*" (Civil Justice Quarterly, vol 32, issue 2, 2013). One disadvantage that should be borne in mind is that there may be a loss of control by counsel over the process. The author is not aware of any hot-tubbing in recent contentious probate cases.

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