A hard case to make

Bromley v Breslin *[2015] exposes the possible cost consequences of an application under CPR 57.7(5) to challenge the validity of a will. Charles Holbech explains*

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'Counsel for Anne requested a determination by the judge, as a preliminary point, as to whether the costs' protection afforded by CPR 57.7(5) applied to cross-examination of witnesses other than the attesting witnesses Newey J ruled that it did not.'

There have been two recent reported cases on CPR 57.7(5) which applies in probate claims where the validity of a will is called into question. That rule provides that:

> (a) A defendant may give notice in his defence that he does not raise any positive case, but insists on the will being proved in solemn form and, for that purpose, will cross examine the witnesses who attested the will.
>
> (b) If a defendant gives such a notice, the court will not make an order for costs against him unless it considers that there was no reasonable ground for opposing the will.

Bromley v Breslin: facts

Marjorie Beck died, aged 85, on 20 May 2013 (the testatrix). By her will, dated 19 April 2012, the testatrix left her residuary estate to her nephew, Stephen. She left nothing to Stephen's two sisters, Anne and Linda. If the will were invalid, Stephen, Anne and Linda would be entitled, on an intestacy, to a third of the residuary estate each. The estate mainly comprised a house, worth between £300,000 and £350,000.

Neither Anne, nor Linda, accepted that the will was valid. They had obtained a statement from one of the attesting witnesses (Robert) given to a retired police officer, that neither the testatrix, nor the other witness (Tony), was present when Robert signed the will. If this evidence were accepted, the will would be invalid for non-compliance with s9 of the Wills Act 1837 in that:

- the signature of the testatrix was not made or acknowledged by her in the presence of two or more witnesses present at the same time, as Robert was not present when the testatrix signed the will (s9(c)); and
- one at least of the witnesses (Robert) did not attest and sign the will in the presence of the testatrix (s9(d)).

Evidence

Robert swore an affidavit explaining that he had been mistaken as to the contents of the statement that he had given to the retired police officer. He categorically stated that both he and Tony had watched the testatrix sign the will, and that they had then both signed it themselves in her presence. Tony swore an affidavit confirming due execution. Stephen also gave a witness statement confirming that he was present when the will was duly executed and witnessed.

The evidence, or at least the revised evidence, of both witnesses, and of the major beneficiary, were consistent. The will, they said, had been executed and witnessed on 19 April 2012 at the Pet Centre at Yarnton Nurseries in Oxfordshire, where both witnesses then worked, and where Stephen had once been an employee. The testatrix signed the will in an office at the Pet Centre in the presence of Stephen and both attesting witnesses. The witnesses were then called up to the top of the shop to serve customers. The testatrix and Stephen followed them shortly thereafter. The will was attested by both witnesses, in the presence of the testatrix, at the customer services' desk.

This evidence was presented to Anne and Linda prior to commencement of

proceedings. However, they declined to accept that the will had been duly executed. Stephen, therefore, commenced proceedings asking for an order for proof in solemn form.

Defences

Linda and Anne pursued different tactics in their defences. Linda pleaded a positive case that the will should be set aside on the grounds of (a) undue influence and (b) want of due execution. The undue influence claim was withdrawn shortly before trial, it being conceded that there was no evidence of coercion.

Anne filed a defence giving notice, in accordance with CPR 57.7(5), that she did not wish to raise any positive case, but insisted on the will being proved in solemn form and, for that purpose, she gave notice that she would cross-examine the witnesses.

Counsel for Anne requested a determination by the judge, as a preliminary point, as to whether the costs' protection afforded by CPR 57.7(5) applied to cross-examination of witnesses other than the attesting witnesses. Newey J ruled that it did not. Accordingly, Anne elected not to cross-examine Stephen, who was a witness, but not an attesting witness. Nor did Anne call the retired police officer, leaving it to Linda to do so.

Anne

The dilemma facing Anne's counsel was that Anne might lose the costs protection of CPR 57.7(5) if he put forward a positive case and, in any event, he could not cross-examine Stephen without forfeiting any claim to rely on CPR 57.7(5). However, he was faced with evidence from the attesting witnesses, and from Stephen, that the will had been duly executed. If the will was not duly executed, then the witnesses had to be colluding in producing a fabricated version of events.

The presumption of due execution also applied. The only evidence which might rebut that presumption was the statement given by Robert to the police officer. However, Robert now denied that the statement was accurate.

These difficulties were reflected in the course that the cross-examination took. The witnesses were cross-examined at length, and in great detail, to establish the narrative of what had happened, and in an attempt to highlight any inconsistencies. However, they were not directly accused of lying, nor of acting out of financial motives. In the event, the evidence of the witnesses was, for the most part, internally consistent and unshaken by cross-examination.

In cross-examination, and more strongly in closing submissions, it was suggested that Robert alone might have signed the will as a witness, at the customer service desk (having been called away to serve customers) and that he had not been joined by the testatrix and Tony. As Newey J stated, Anne's counsel 'made observations on the evidence but did not go so far as to put forward a positive case that the will was invalid'.

Newey J found that Robert's memory was poor on a number of matters.

Anne's counsel drew back from a full-frontal assault on the credibility of the witnesses, as that would amount to the presentation of a positive case, and with it the potential loss of costs protection under CPR 57.7(5). Indeed, he did not even cross-examine Stephen, not being one of the attesting witnesses, for fear of losing the costs protection of CPR 57.7(5).

In consequence, a strong positive case was not advanced that the witnesses were not telling the truth because Robert had been called away, and had, therefore, attested the will on his own (hence his initial evidence to the retired police officer that neither Tony, nor the testatrix, had been present when he signed the will).

Linda

Linda's counsel was free to advance a positive case on want of due execution. However, he adopted the cross-examination of Anne's counsel (which fell short of making a positive case). He did challenge the veracity of the witnesses on a number of grounds, and contended that the will was not validly executed. However, the main thrust of his cross-examination was that the testatrix had not intended to leave the whole of her estate to Stephen, or indeed to execute any will at all.

It was, in effect, alleged that the will was invalid on the grounds of want of knowledge and approval. However, want of knowledge and approval had not been pleaded as such, albeit that some of the material relied upon in support of that allegation had been pleaded in respect of the abandoned undue influence claim. In any event, there was incontrovertible evidence from the solicitor, who had drafted the will, that he did so in accordance with the testatrix's instructions.

Decision

Newey J upheld the will. He ruled that it was too late for Linda to raise a plea of want of knowledge and approval. The only issue was whether the will had been duly executed. He accepted that the strongest evidence was required to rebut the presumption of due execution. He found Stephen and Tony to be persuasive witnesses.

Little weight could be given to the evidence of Robert given to the retired police officer. In cross-examination the retired police officer had admitted that his understanding of Robert's evidence was that neither the testatrix, nor Tony, had not been present at the Pet Centre when the will was alleged to have been executed. However, that was clearly wrong. Newey J found that Robert's memory was poor on a number of matters. The problems and inconsistencies in Robert's evidence were not sufficient to reject the persuasive evidence of Tony and Stephen. Linda had, in his judgment, got nowhere near overriding the presumption of undue influence.

Costs

Newey J gave a separate costs judgment, following written submissions.

Anne's reliance upon CPR 57.7(5) was effective, in that Newey J accepted that she had not advanced a positive case, and that it could not be said, in the light of Robert's evidence to the retired police officer, that there were no reasonable grounds for opposing the will. Therefore, it was not appropriate to order Anne to pay Stephen's costs. She should simply be left to pay her

own costs, in accordance with CPR 57.7(5).

Linda was in a different position. She had, in effect, lost, and costs would follow the event. It did not matter that the circumstances may have warranted an investigation of the validity of the will. Linda had not relied on CPR 57.7(5). She had advanced a positive case, taking a commercial decision, which proved to be mistaken.

Counsel for both Linda and Anne submitted that the case fell within the following recognised exception to the rule that costs would normally follow the event: costs may be ordered to be paid out of the estate where either the testator, or the residuary beneficiaries, have been the cause of the litigation.

It was alleged that Stephen had been the real cause of the litigation because he could and should have taken the testatrix to an independent solicitor to preside over the execution of the will, rather than arranging for the will to be witnessed by witnesses who were better known to him than to the testatrix, so adding to concerns as to their independence.

This submission was rejected by Newey J. The mere fact that someone can be said to be responsible for a will having been executed otherwise than in front of a solicitor cannot make it appropriate to view them as the cause of litigation about it. Indeed, the statement made by Robert to the retired police officer could more plausibly be seen as having occasioned the litigation, but that could not be laid at Stephen's door.

Newey J also considered that the testatrix could not be regarded as having caused the litigation. A testator is not to be taken to have promoted litigation by leaving their own affairs in confusion or because she misled other people and perhaps inspired false hopes that they might benefit after her death.

Stephen's counsel submitted that Stephen should be entitled to recover 100% of his costs relating to the undue influence claim, and also 100% in relation to the want of due execution claim because, even if Anne had not been a party, Stephen would still have been forced by Linda to incur the same costs, as he did incur in proving due execution. However, Newey J ordered that Linda should pay 75% of the costs, up until the date when she withdrew her undue influence claim, and 50% thereafter, on the basis that 50% of such costs, including the costs of trial, related to Anne, and were within CPR 57.7(5). If only 50% of the successful party's costs are recoverable in these circumstances, that is a factor which needs to be taken into account in contemplating settlement proposals.

Comment

In a case where the presumption of due execution applies, the strongest evidence is required to rebut the presumption. The court may find that a will has been properly executed even if the witnesses have no recollection of the having attested the will, or where they have given positive evidence that they did not see the testator sign. Indeed, the court has, on occasion, disregarded the positive evidence of one or more of the attesting witnesses that the will was not duly executed, as being contrary to the weight of the evidence as a whole (*McCabe v McCabe* [2015]; *Briscoe v Green* [2006]).

In *Bromley* the attesting witnesses, and the main beneficiary, all gave evidence that the will had been properly executed. It was, therefore, difficult to establish that they were lying or mistaken, and to rebut the presumption of due execution, without making a positive case. In the absence of a positive case, the will is likely to be upheld. If, on the other hand, a positive case is made, the challenger faces the prospect of an adverse costs order, if unsuccessful.

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Elliott v Simmonds [2016]: facts

The testator had made a will under which his partner, the claimant, was the sole beneficiary (the will). The will superseded one made two years previously in which he had left a substantial legacy to his daughter. When the claimant sought probate, the daughter gave notice under CPR 57.7(5)(a) that although she did not raise any positive case, she insisted on the will being proved in solemn form. For that purpose she invoked her right to cross-examine the attesting witnesses. The issues were testamentary capacity, and knowledge and approval. The solicitor who prepared the will was cross-examined at some length in an attempt to raise doubts as to the testator's capacity and knowledge and approval.

The challenge to the will failed. The judge (Edward Murray sitting as a deputy) found that the testator had testamentary capacity, and that he knew and approved of the contents of the will. Prima facie, therefore, the daughter was liable to pay the claimant's costs. Pursuant to CPR 57.7(5)(b) the court could not make an order for costs against the daughter unless satisfied that she had no reasonable grounds for opposing the will.

The daughter submitted that she had reasonable grounds because there was no apparent reason why her father should have extinguished her legacy; the solicitor who drafted the will had not made detailed attendance notes; and there was medical evidence which merited exploration.

The judge concluded that, on the evidence, the daughter had no reasonable ground for opposing the will. The extinguishing of the previously indicated legacy was a matter for the testator. It did not go to testamentary capacity and did not justify the solicitor being called for cross-examination. While it was regrettable that the solicitor had not made detailed attendance notes, given the simplicity of the will and the ample supporting evidence, it should have been clear that there was little to be gained from summoning him for cross-examination. Finally, it was hard to see what useful insight could have been obtained from cross-examining the solicitor on the medical evidence. Indeed, nothing of significance emerged from his cross-examination on that matter.

Costs were ordered against the daughter, but only from the date on which she, with her advisers, had sufficient material on which to form a view about whether there was any reasonable ground on which the will could be opposed.

Comment

Elliott v Simmonds appears to have been a forlorn attempt to invoke CPR 57.7(5). As the judge pointed out, there is a presumption of testamentary capacity where a will is duly executed and appears rational on its face. There is also a strong *prima facie* case for the validity of a will in a case where an independent and experienced solicitor has professionally prepared the will on instructions and then explained it to the maker of the will.

There is also a presumption of knowledge and approval where a will has been duly executed by a testator with the requisite capacity. That presumption is strengthened where the will has been prepared by an independent and experienced solicitor and read to the testator.

It may be difficult to rebut these presumptions in cross-examination without making a positive case, in which event the protection of CPR 57.7(5) will be lost. In *Elliott* the judge concluded that the cross-examination was ineffective to overcome the presumptions of capacity and knowledge and approval. As the cross-examination was ineffective, there were no reasonable grounds for opposing the will, and costs protection did not apply.

One point of note in *Elliott* is that the solicitor who was subjected to cross-examination was not one of the witnesses who signed the will (although he is described by the judge as 'an attesting witness', presumably because he was present when the will was executed). The authority of *Breslin* CPR 57.7(5) does not apply where there is cross-examination of witnesses other than the attesting witnesses properly-so-called.

Positive case

It is, of course, always possible to make a positive case, taking the risk of an adverse costs order. The claim may succeed.

Even if the claim does not succeed, there may be a residual argument, even where a positive case is raised, that the court should exercise its discretion to make no order for costs where the circumstances led reasonably to an investigation of the matter (*Spiers v English* [1907]).

However, in *Bromley* Newey J did not think that he should decline to make a costs order against Linda simply on the footing that the circumstances warranted an investigation into the will's validity. In *Elliott* the judge applied CPR 57.7(5)(b) and concluded that the daughter should pay the claimant's costs because there were no reasonable grounds on which to oppose the will.

There may be cases where there are reasonable grounds for cross-examination, even though the challenge to its validity is ultimately unsuccessful.

Scope of CPR 57.7(5)

A person who wishes to challenge the validity of a will, without being liable for the proponent's costs, if unsuccessful, faces a real quandary in that they cannot rely upon CPR 57.7(5) if:

- they make a positive case;
- they cross-examine any witness other than the attesting witnesses;
- they call their own witnesses; and/or
- there are no reasonable grounds for opposing the will.

There may be cases where there are reasonable grounds for cross-examination, even though the challenge to its validity is ultimately unsuccessful. In *Bromley* execution of the will had not been supervised by a solicitor, and one of the attesting witnesses had given inconsistent evidence as to execution. In *Davies v Jones* [1899] one of the attesting witnesses and the solicitor who prepared the will were dead. The other attesting witness was a person whose uneducated recollection was extremely vague.

However, even if it is reasonable to cross-examine, it does not follow that it is always advisable to rely upon CPR 57.7(5). In many cases, there will be a presumption of due execution, or of testamentary capacity, or of knowledge and approval. It may be possible to rebut those presumptions in cross-examination without making a positive case if, for instance, the witnesses materially contradict each other, or falter in their evidence. However, if they do not do so, the handicap of not being able to raise a positive case may well mean that there is little prospect of setting aside the will.

In *Bromley* Anne obtained costs protection by virtue of her reliance upon CPR 57.7(5). She was not ordered to pay Stephen's costs. However, this was not much of a victory given that:

- she had to pay her own costs, having lost; and
- she had not been able to put forward a positive case.

Conclusion for practitioners

In conclusion, CPR 57.7(5) may only be of use if:

- there are grounds for alleging invalidity, for example, because something appears to have gone wrong with the execution of the will; and
- there is a real prospect that the deficiency will be confirmed by cross-examination, even if no positive case is made.

However, such cases are likely to be rare. A person proposing to challenge a will cannot readily escape the prospect of an adverse costs' order by reliance upon CPR 57.7(5). ■

Breslin v Bromley
[2015] WTLR 219
Briscoe v Green
[2006] EWHC 2116 (Ch)
Davies v Jones
[1899] P 161
Elliott v Simmonds
[2016] EWHC 732 (Ch) to be reported in a future edition of WTLR
Elliott v Simmonds
[2016] EWHC 962 (Ch) to be reported in a future edition of WTLR
McCabe v McCabe
[2015] EWHC 1591 (Ch)
Spiers v English
[1907] P 122