

Contentious Probate: Catching out the fraudsters

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Perceived trends in contentious probate

As challenging as ever to establish undue influence or fraudulent calumny?

- *Nutt v Nutt* [2018] EWHC 851 (Ch) – (unsuccessful on undue influence)
- *Todd v Parsons* [2019] EWHC 3366 (Ch) - (unsuccessful on undue influence and fraudulent calumny)
- *Rea v Rea* [2019] EWHC 2434 (Ch) – (unsuccessful on undue influence and fraudulent calumny)
- *Barnaby v Johnson* [2019] EWHC 3344 (Ch) – (unsuccessful on undue influence)
- *Coles v Reynolds* [2020] EWHC 2151 (Ch) – (unsuccessful on undue influence)

But a different story in cases of forgery?

Burdens

Usual civil burden of proof

But: 'cogent evidence' required for more serious allegations

Re H [1996] AC 563 per Lord Nicholls

"When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger the evidence should be before the court concludes that the allegation is established on the balance of probability."

Burdens

Burden upon the claimant to establish U.I. / fraudulent calumny

No presumption of U.I., notwithstanding that it usually occurs behind closed doors

Very difficult to infer undue influence

Re Edwards (Deceased) [2007] EWHC 1119 (Ch) per Lewison J

"It is not enough to prove that the facts are consistent with the hypothesis of undue influence. What must be shown is that the facts are inconsistent with any other hypothesis."

Burdens

Plead as want of knowledge and approval?

Burden upon the party propounding the will in circumstances which excite the suspicion of the court

But not a means by which to plead undue influence / fraud by another name, thereby reversing the burden of proof

Ark v Kaur [2010] EWHC 2314 (Ch) per HHJ David Cooke at [43]:

"the court will not allow that rule [as to excitement of suspicion] to be used as a screen for allegations of fraud and dishonesty, which must be pleaded and proved."

Burdens

In theory, proving forgery should be harder still:

Presumption of due execution

A conspiracy between forger and witnesses?

But:

Tangible evidence of the product of the fraud (the purported will)

Pinned down to a date and time

Recent willingness of the courts to place burden of proof upon defendant to allegation of forgery?

Recent forgery cases

In theory, proving forgery should be harder still:

Patel v Patel [2017] EWHC 133 (Ch)

Cook v Abrahams [2018] WLUK 517

Re Ball (Deceased) [2020] 1 WLUK 544

Face v Cunningham [2020] EWHC 3119 (Ch)

Re Brunt (Deceased) [2020] EWHC 1784 (Ch)

***Patel v Patel* [2017] EWHC 133 (Ch)**

Case Summary

- Family wealth – worldwide interests \$200m
- Mum dies leaving 4 sons
- Long-running, acrimonious dispute across multiple jurisdictions between sons re family empire
- Giresh falls out with other brothers – allegations in other proceedings that he has forged documents
- 1986 will – left everything to son Yashwant (D)
- Giresh brings claim to prove a 2005 will – of which he is beneficiary
- D says Giresh forged the 2005 will

***Patel v Patel* [2017] EWHC 133 (Ch)**

Propounder of the will said:

- Didn't know about the earlier will. Mum worried Yashwant would use her money towards a religious sect of which she was not a devotee
- Girish personally didn't think a will was necessary
- But he drafted the will for her in English, had his secretary type it up and execution took place at his London offices
- People present at execution included: Mum, Girish, Ranjanbala (Girish's former employee), Jayshree (had been married to Girish's brother in law) and Girish's secretary, Nirja
- Mum signed will in their presence. She didn't speak English so Girish explained the terms in her mother tongue
- He forgot about the will until 3 years post death. Never told brothers about it.

***Patel v Patel* [2017] EWHC 133 (Ch)**

Court held – Forgery

Key Factors:

- Girish's account of genesis and execution implausible (e.g. Girish forgetting about the will when the deceased died, paper on which the will was printed – very odd to use cut-down, old company headed paper, not seeing a solicitor, delay in disclosing the will)
- Documentary record – emails in which Girish had made previous inconsistent statements
- Girish, Ranjanbala and Jayshree found to have lied to the court so unable to attach any weight to their account of events
- Evidence of Nirja – not a proven liar but unable to rely on her evidence
- Nothing outside the witness evidence to independently corroborate Girish's case e.g. meta data from the pc on which G allegedly prepared the will was unavailable because apparently stolen before proceedings

***Patel v Patel* [2017] EWHC 133 (Ch)**

Court held – Forgery

Key Factors:

- Girish had strong motive – provided him control over substantial asset and tactical advantage in litigation with brothers
- Girish exercised influence over both witnesses
- Girish had the means to commit the forgery – there were available blank pre-signed papers by Mum
- Expert evidence:
 - No explanation for an impression signature revealed by ESDA lifts inconsistent with Girish's case
 - Evidence from chemical analysis that the dating of Mum's signature on the will pre-dated the witnesses

***Patel v Patel* [2017] EWHC 133 (Ch)**

Fall out from the probate judgment:

- Successful contempt of court application against Girish and the other persons present at the alleged execution
- All found in contempt
- Girish sentenced to 12 months in prison
- Witnesses received 3 months suspended sentence

***Cook v Abrahams* [2018] WLUK 517**

Case summary:

- Trial before Deputy Master Cousins
- C represented, relied upon expert evidence
- Ds in person, no expert evidence
- Claimant was sister of late Mrs Edwards
- Mrs Edwards died in Zimbabwe 2015
- Property in the UK: home in Golders Green
- Original will never produced
- Comparison signatures with passport and hospital card

***Cook v Abrahams* [2018] WLUK 517**

Propounder of the will said:

- Beneficiary (D2) was deceased's nephew and claimed that was like a son to the deceased "*closest person to her in her life*"
- Alleged will 22 November 2011, D2 as major beneficiary
- Deceased varied her signature
- Original will lost because entrusted to unreliable friend
- Ds relied upon fact that first handwriting expert approached by C had said they would need the original
- Probate already granted to purported will in Zimbabwe
- Niece of D2 (a beneficiary under the purported will) claimed to have found it at Deceased's home "my god I've found a will!"

***Cook v Abrahams* [2018] WLUK 517**

Court held – Forgery

Key Factors:

- Burden of proof on party propounding will (heavy burden where suspicion excited)
- Expert evidence for C (Mr Radley): “strong evidence” of forgery notwithstanding only photocopy, a free-hand simulation of the fluent and stylised handwriting of Deceased by someone who knew it well. Various points of difference between the two
- Probate in Zimbabwe not a substantive determination of validity

***Cook v Abrahams* [2018] WLUK 517**

Court held – Forgery

Key Factors:

- C called numerous close family members: uncle, sister, sister-in-law, niece – even shopkeeper / friend / house-sitter; contents of purported will contrary to known wishes
- Common theme that deceased disparaging of D2 “lazy” “mean” “greedy”
“selfish and greedy and he cannot have a single cent of mine”
- C’s evidence “convincing, unshakeable”
- D2 unreliable – did not ask anyone about a will before searching for it
- witness to will – discrepancies in two statements

***Cook v Abrahams* [2018] WLUK 517**

Court held – Forgery

Key Factors:

- No mention of the alleged will by deceased to family members
- No mention to lawyer in Zimbabwe instructed to make a new will in 2012/2013
- No mention in diary entries (only to intention to make a will)
- Purported will was typed: Deceased by all accounts wrote only in manuscript (did not own a computer or typewriter)

Re Ball (Deceased) [2020] 1 WLUK 544

Case Summary

- Mum died leaving two children: David and Linda
- Background – mum's husband died in 2012 and mum struggled to cope. Linda had managed mum's finances until August 2015. Dispute developed as to whether Linda had been taking mum's money for herself. Evidence that mum believed Linda had stolen from her.
- 2015 will - professionally drawn appointing David sole executor, 88% of residue to David and remaining 12% to three grandchildren
- Linda produced homemade 2017 will - appointing Linda and husband as executors, 88% of residue split between Linda and David and remaining share to grandchildren
- David brought claim challenging validity of 2017 will on grounds of forgery and knowledge and approval

***Re Ball (Deceased)* [2020] 1 WLUK 544**

Propounder of the will said:

- 2017 will prepared at mum's request by Linda and executed at her house on 4 January 2017
- She had been in touch with mum since December 2016. Mum said she wanted to make a new will. On 4 January 2017, Linda collected mum from her bungalow at c.2pm and drove her to her house, where she had prepared the will
- Mr and Mrs Binks witnessed. Brief encounter at Linda's house.

***Re Ball (Deceased)* [2020] 1 WLUK 544**

Court held – Forgery

Key Factors:

- CCTV of mum's bungalow on day of alleged execution proved mum did not go out nor did Linda visit to collect her
- Linda did not avail herself of the opportunity to inspect/ examine the CCTV
- Communications between David and mum that day. Evidence of mum's phone activity showed her receiving and making calls at around 2pm that day from her bungalow.
- Linda's credibility (e.g. her diary in 2015 – she was recording her evidence to refute any allegation of wrongdoing and was prepared to record a version of events which was untrue)

***Re Ball (Deceased)* [2020] 1 WLUK 544**

Court held – Forgery

Key Factors:

- Expert evidence – “fairly unlikely” that the signature was mum’s. Linda’s expert agreed that differences were present in the signatures in the 2017 will vs an earlier will such that the earlier could have been used as the master signature in creating the 2017 will.
- Linda’s evidence of close relationship with mum was at odds with evidence from other witnesses independent of David. Also with transcripts of mum’s conversations with David.
- The Binks – witnesses to the will. Even signed statements confirming that a photo of mum was a photo of the lady they witnessed signing the will.
 - Held that Mr Binks’ willingness to be certain as to identification based on a 10 minute encounter and the photo of mum placed doubt on his evidence

***Face v Cunningham* [2020] EWHC 3119 (Ch)**

Case summary:

- Trial before HHJ Hodge QC (sitting as a deputy)
- 'Dysfunctional' family
- 3 children of the late Mr Face: Rebeca v Rowena and Richard
- Rebeca as a litigant in person

***Face v Cunningham* [2020] EWHC 3119 (Ch)**

Case summary:

- No original, only copy

“If the late Sir Arthur Conan Doyle... were to write up the events which have led to this present, unhappy litigation, they would not doubt have titled the resulting chronicle ‘The Case of the Missing Original Will’”.

- Single joint handwriting expert: inconclusive
- Turned on credibility 6 witnesses had to be warned by the judge of privilege against self-incrimination (but that adverse inferences may be drawn by failure to answer)

***Face v Cunningham* [2020] EWHC 3119 (Ch)**

Propounder of the will said:

- Last will 7 September 2017 favouring Rebeca
- No original
- Copy said to have been found under a bedspread at deceased's home, unknown to Richard who was there
- Will witnessed by a Mr Humphreys and a Ms McKenna in Cambridge
- Deceased had referred to intention to make a will in those terms in a letter of 4 May 2017

***Face v Cunningham* [2020] EWHC 3119 (Ch)**

Propounder of the will said:

Home made will:

“I give and bequeath my whole Estate and my residence True Blue, to my Daughter Rebeca Olivia Lucille Face, less the gifts described below. Rebeca we do not always agree, quit[e] often we disagree. Regardless of this, you are the only one of my children to communicate with me, you are the only one to call mee Dad. I promised I would take care of you for the rest of your life, you have done more for me than I thought you would, I look forward to a few more years as friends.”

***Face v Cunningham* [2020] EWHC 3119 (Ch)**

Court held – forgery

Key factors:

- Turned on credibility of witnesses
- Burden of proof treated as being upon the party propounding the will, as a necessary part of proving due execution (*Haider v Syed* [2013] EWHC 4079 (Ch) and textbooks mistaken on this point)
- Numerous journal entries, missing on key dates
- Deceased had seen solicitor, Mr Pearl, a year before the date of the purported will. Undecided on will, but clear concern to preserve property in London for Richard

***Face v Cunningham* [2020] EWHC 3119 (Ch)**

Court held – forgery

Key factors:

- 4 May 2017 letter (in part at least) a forgery – journal entries from this time removed
- Journal entries for time of making purported will removed
- 9 September 2017 letter (genuine) to Rebeca made no mention of will

***Face v Cunningham* [2020] EWHC 3119 (Ch)**

Court held – forgery

Key factors:

- Four evidential factors:
 - (1) That will existed at all - not mentioned in journal entries
 - (2) Contents of 2017 will - contrary to known wishes (would not leave Richard homeless), mentioned Richard's child (of whom deceased was ignorant)
 - (3) Circumstances of execution - would not have made a 80 mile round trip to Cambridge, certainly not without telling neighbours to keep an eye on his house (after burglary)
 - (4) Circumstances of discovery (email Rebeca to solicitor "I found the WILL!!!!!!!!!!!!")

Claim by Rebeca "totally without merit" – transcript to be sent to CPS

Re Brunt (Deceased) [2020] EWHC 1784 (Ch)

Case Summary

- Dean died 8 December 2007 aged 35
- Left mum (Marlene), brother (Dale), sister (Venetia) and Uncle Bob
- Marlene took letters of administration in 2008 and administered on intestacy
- Over 10 years later – 2018 – Uncle Bob brought claim to propound will dated 2 March 1999
- Marlene and Dale defended on grounds of (a) forgery (b) due execution and (c) knowledge and approval
- Background – complex and long-running family dispute between Bob and Venetia v Marlene and Dale. Will produced 8 days before mediation scheduled in part of that dispute. The will improved position of Bob and Venetia.

Re Brunt (Deceased) [2020] EWHC 1784 (Ch)

Factors said to be relevant to forgery:

- Will not signed by Dean – allegedly signed at his direction by known, convicted fraudster, Howard Day, who was handling the family dispute for Bob and Venetia
- Howard not a solicitor but found prepared to allow others to think he was. Charged for his services
- Witnesses were an employee and associate of Howard
- Duplicate wills
- Irregular attestation clause – signed “as enduring power of attorney”
- No “one third share” of property in 1999 – only received years later
- Name incorrect on front of will – wrong middle name and spelling of Marlene’s farm incorrect

Re Brunt (Deceased) [2020] EWHC 1784 (Ch)

Factors said to be relevant to forgery:

- Date on will same type font as rest of the will
- Explanation of why Dean asked Howard to sign implausible
- Similar fact evidence regarding Howard producing documents
- Will allegedly found by Howard in 2018
- No plausible explanation for delay in producing the will – the second, duplicate was not produced until mere days before the PTR
- Doctored diary entry – “& Signed Up Will” – expert evidence – words appended in a different ink, not found anywhere else in the diary and at a different time to the rest of the entry
- No mention of 2 wills in the pleadings, witness statements including those of witnesses to the wills

Re Brunt (Deceased) [2020] EWHC 1784 (Ch)

Factors said to be relevant to forgery:

- Handwriting experts – both experts agreed *"strong evidence to support the proposition that Mr Day did not sign the Will in 1999 as purported, but at a later date, when his writing had deteriorated"*

and "it is more likely than not that both these signatures were written at a later point in time"
- Printing of the 2nd page of the First will – different paper and different printer.
- Dean had learning disabilities and schizophrenia – out of character to make a will and no dependents or assets in 1999/ no reason to make one

Re Brunt (Deceased) [2020] EWHC 1784 (Ch)

Court held – NOT a forgery

- Notably though, the Master reversed the burden of proof re forgery given length of time and will not signed by Dean – evidential burden on Bob.
- But, Master did order **costs** to be paid out of the estate pursuant to first exception to general rule as to costs in probate claims – (**[2020] EWHC 2205 (Ch)**) –
"... the conduct of Howard Day should be treated as part of, or an extension of, the testator's conduct... The fact that the will was not signed by Dean but by Howard Day on his behalf was of itself bound to be a source of family argument and suspicion. Both Howard Day and Dean through proceeding in this way caused the litigation"
- **Successful appeal ([2021] EWHC 368)** – Order set aside. **Retrial** ordered before HCJ + permission to rely on fresh evidence

LESSONS from recent forgery cases

- Do not underestimate the importance of expert evidence (propounder had none in Cook)
- Do not underestimate the scope of expert evidence (analysis of photocopies and/or other documents in Cook, Face, Brunt)
- Do not overlook ability to succeed without expert evidence / where it is inconclusive (Face)
- Burden of proof – on party propounding the will? (Cook, Face, Brunt)
- The importance of context: deceased's known wishes, relationships
- The voice of the deceased: journal entries of deceased (and forger) (Brunt, Ball, Cook, Face)
- Credibility of witnesses – impact of independent corroborating witnesses

LESSONS from recent forgery cases

- Other technology - CCTV and other means of placing a party at a point in time
- It can pay to be creative in investigations e.g. Patel, Face
- What propounder withholds can be as important as what they disclose (Patel) - usefulness of Pt 18 requests
- Don't overlook motive (Face, Brunt)
- Forged will not just to be scrutinised for its signature: content, tone (Face), timing
- Circumstances of discovery of the alleged will worth scrutinising
- Assess weight of totality of evidence

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