Contested probate and *Larke v Nugus*

Is it law in Australia?

WITH CHRISTINE SMYTH

"Listen here love, there is a proverbial 50-foot wall between Coolangatta and Tweed Heads when it comes to practice and procedure, so your guidance note does not mean squat in New South Wales."

That was the clear, if inelegant, submission put to me over the phone many years ago by a NSW practitioner when I asked him to provide me with a *Larke v Nugus* statement.

While there was much wrong with what he said to me – I was not his love and there was no love lost between us – I could not escape the reality that he was correct in law as to the application of the QLS guidance note, 'Disputed Wills (Contested Probate Matters)', in other jurisdictions.

For this and other reasons, *Larke v Nugus* requests have always been difficult to navigate. One of the stumbling blocks has been that *Larke v Nugus* was an English decision with no jurisprudential consideration here in Australia.[1] But that has now changed with the Victorian decision of *Re Gardiner* (No.3) [2018] VSC 414 (*Re Gardiner*).[2]

A lengthy judgment of 44 pages, *Re Gardiner* involved an application to revoke a grant of probate on the grounds of testamentary incapacity.[3] It is a worthy read for an exposition on the law of revocations of grants. Relevantly here though, in oral submissions[4] the applicants complained of a refusal to comply with a *Larke v Nugus* request "about how the 'chain of wills' came to be made, including requests for copies of the will files which is not in accordance with the English decision of *Larke v Nugus*".[5]

Acknowledging that their submissions did "not relate to the issue of the prima facie case put by the applicants",[6] MacMillan J proceeded to analyse the application of *Larke v Nugus* in Australia.[7] While that analysis is obiter, *Re Gardiner* is the only decision in Australia to consider the case, and as such it is now part of our common law with persuasive value in all Australian jurisdictions.[8]

Strikingly, as a starting point, citing each of the decisions[9] that have considered *Larke v Nugus*, her Honour declared:

"upon a proper consideration of the decision, it does not stand for the proposition that the applicants have a right to issue a *Larke v Nugus* letter to the plaintiffs requesting information concerning the making of the 'chain of wills' and the relevant will files, or that such an application creates

a corresponding obligation on the plaintiffs to respond to such an application."[10]

> **Hark, hark! the lark**
> **On windswept bark**
> **Freezes against a**
> **sky of lead!**
> **Now see him stop,**
> **take one small hop,**
> **And suddenly keel**
> **over dead!**
>
> Ogden Nash, The Lark

From there her Honour distinguished the facts upon which *Larke v Nugus* was determined, reminding practitioners that it was an appeal on costs case arising from a proceedings seeking a grant of probate of a will in solemn form primarily founded in undue influence and lack of knowledge and approval.[11] Central to the issue of costs were the pleadings and the decision by the defendants to insist on the original matter being tried out.[12]

The questions as to who should bear the costs involved consideration of the impact of abandoning certain pleadings, how those pleadings were entwined with remaining pleadings, and the relationship the pleadings had with the materiality of the solicitor's evidence. That in turn involved consideration of his refusal to provide the statement sought in circumstances in which the Law Society of England and Wales made recommendation as to what a solicitor should do when a solicitor is a material witness. Ultimately, there was no order as to costs.[13] In the context of the matter before MacMillan J, her Honour distinguished *Larke v Nugus*:

"The facts and circumstances in *Larke v Nugus* are substantially different from the applicants' position. The applicants are seeking to establish a prima facie case on the ground of testamentary incapacity whereas the plaintiffs in *Larke v Nugus* were seeking a grant in solemn form against a challenge by the defendants on the grounds undue influence and lack of knowledge and approval. Prima facie, the contents of the will files are of minimal or no relevance to the applicants' ground of testamentary incapacity"[14] "the recommendation by the Law Society was for a statement of evidence to be provided by the solicitor executor concerning the execution of the will, not for copies of the entire will files"[15] "in Australia confidentiality to a client also continues after the client's death."[16]

While distinguishing the application of *Larke v Nugus* on the facts and the pleadings, her Honour did however note the obiter of Brandon LJ as to the duties of a solicitor when their knowledge makes them a material witness.[17] That is the critical aspect. First and foremost a solicitor is an officer of the court and in most jurisdictions solicitors are required to assist the court in the efficient conduct of matters before the court.[18] This is especially the case in relation to probate matters.[19] "[A] grant of probate is more than just a court order: it is a judicial act and proof of the validity of the will", and "an instrument of title that binds parties and non-parties".[20]

While helpful, the obiter in *Re Gardner* as to the application of *Larke v Nugus* does not stand alone and must be considered in the context of existing decisions involving the giving of evidence in probate disputes. For example, in *Gordon v Hilton*[21] it was found that statements by testamentary witnesses to their own solicitor in anticipation of a testamentary action are not privileged. People who are witnesses to the execution of a will are considered witnesses of

the court. Accordingly, they stand in a special position[22] – "the court in its inquisitorial capacity is seeking the truth as to execution"[23] – and in that context the witnesses to the execution are there to assist the court in its search for that truth. In Queensland, section 6, of the *Succession Act 1981* provides the court extensive powers in probate matters with the power to compel attesting witnesses to give evidence through, for example, rule 637.[24]

So then, how does the guidance note reconcile with *Re Gardiner*? There are some tensions within the guidance note in light of *Re Gardiner* which are worthy of review. Namely, the considerations as to the duty to provide a statement in the context of the type of probate challenge being made, the timing of the provision of such a statement, and importantly, the provision of will files. The QLS Ethics and Practice Centre[25] is aware of *Re Gardiner* and is considering the issues raised; the matter has also been referred to the QLS Succession Law Committee. The tensions around *Larke v Nugus* requests also form part of the discussion by the Law Council of Australia in its review of the Australian Solicitors Conduct Rules (ASCR), which may result in amendment of the ASCR.[26]

As to that NSW solicitor, no point in bashing one's head against his brick wall – I went around it.

Christine Smyth is a former President of Queensland Law Society, a QLS Accredited Specialist (succession law) – Qld, and Consultant at Robbins Watson Solicitors. She is an Executive Committee member of the Law Council Australia – Legal Practice Section, Court Appointed Estate Account Assessor, member of the QLS Specialist Accreditation Board, *Proctor* Editorial Committee, QLS Succession Law Committee and STEP, and an Associate Member of the Tax Institute.

Notes

1 Note that in 1998 South Australia had a rule reflecting the *Larke v Nugus* statement requirements; however that rule was not included when South Australia adopted the Australian Solicitors Conduct Rules.

2 Note *Larke v Nugus* was referred to in the recent decision of *Albury v Sammut* [2019] QSC 105, at [50] as being merely noted as forming part of the exchange of correspondence between the parties.No analysis was undertaken.

3 At [38].

4 At [42] and [108].

5 At [108].

6 At [109].

7 At [108]-[120].

8 *Lipohar v The Queen* [1999] HCA 65.

9 At footnote 65 of the judgment.

10 At [109].

11 At [110] cf the matter for determination was a revocation of probate due to incapacity.

12 At [115].

13 At [114].

14 At [118]-[119].

15 At [120].

16 At [120]; note however the 'dominant purpose' test that now applies; and that the privilege attaching to the deceased does not apply against persons interested in the estate as beneficiaries – *Russell v Jackson* (1851) 9 Hare 387; 68 ER 558; *Re Moore* [1965] NZLR 895; see also *Uniform Civil Procedure Rules 1999* (Qld) r637 – Subpoenas.

17 At [116].

18 See Australian Solicitors Conduct Rules,in particular Rule 3: *"A solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty."*

19 Refer to table below

20 At [122]; see also the writer's *Proctor* article, June 2018, 'Probate, proof and probity discussing *McKeown v Harris & Anor; In the Will of Patricia Margaret Rice* [2018] QSC 87.

21 Supreme Court of NSW, Young J, unreported, 13 October 1995 (BC9501693); see also *Re Webster* [1974] 1 WLR 1641.

22 *In the Estate of Fuld deceased* [1965] p405, 409.

23 *In the Estate of Fuld deceased* [1965] p405, 410 per Scarman J.

24 Consideration of this power is outside the scope of this article.

25 My thanks go to QLS Ethics and Practice Centre Director Stafford Shepherd and QLS Ethics Solicitor David Bowles for bringing this decision to my attention. Further thanks go to QLS Ethics Solicitor Shane Budden, Tim Donlan of Donlan Lawyers, Katerina Peiros of Hartwell Legal, Chair of Browne Linkenbagh Legal Services Darryl Browne, Darlene Skennar QC and Robbins Watson law clerk Rachel Mallard for their assistance with research.

26 Law Council of Australia Review of the Australian Solicitors Conduct Rules, February 2018.

Probate	Qld	NSW	Vic.	SA
Speed/efficacy/ minimum expense	*Uniform Civil Procedure Rules 1999* – Rule 5	*Civil Procedure Act 2005* – s59	*Civil Procedure Act 2010* – s7	
Court's discretion of factors to consider when determining costs	*Uniform Civil Procedure Rules 1999* – Rule 700A	*Civil Procedure Act 2005 -s98 Uniform Civil Procedure Rules 2005 – Rule 42.1*	*Civil Procedure Act 2010* – s29	
Efficient conduct of civil litigation	Supreme Court Practice Direction 18/2018	*Civil Procedure Act 2005* – s57	*Civil Procedure Act 2010* Part 2.3 The Overarching Obligations; Part 2.4 Sanctions for Contravening the Overarching Obligations	*Administration and Probate Act 1919* – s24, s25