A reasonable rejection?

Judges need to be on firm ground when disregarding good & persuasive expert evidence, as Dr Chris Pamplin explains

IN BRIEF

- Fact finding commences with the taking of evidence of reliable, contemporaneous documents.
- Proper and appropriate weight should be given to expert evidence.

It is reasonable to expect that where expert evidence is given by a well-qualified expert in an established field, the court would need very good reasons to disregard it. But to what extent is this required and how far should the judge go in giving reasonable grounds for disregarding what is, prima facie, good and persuasive expert evidence?

In *Brunt v Wrangle* [2021] 1 WLUK 332, Mr Justice Green heard the appeal of two appellants in probate proceedings. These were the mother and brother of a deceased person who had originally been granted letters of administration on the basis that the deceased had died intestate. Some ten years after the grant, an uncle of the deceased, supported by the deceased's sister, had come forward with a document purporting to be a will made by the deceased in 1999. It was alleged that this will had been discovered by an adviser to the family. The will had been contested as a forgery by the appellants, who claimed it was created after death. The adviser, who had since died, had a previous conviction for fraud.

A copy of the purported will was also found. Both the will and the copy bore the signature of the adviser as attorney to the deceased, but the signatures were slightly different. Documents were also produced purporting to be two attendance notes and an entry in the adviser's diary stating that the will had been signed.

The appellants had obtained expert evidence. Two handwriting experts agreed that the two wills had been executed separately. They had concluded that the adviser had not signed these in 1999, as claimed, but at a later date when his handwriting had deteriorated. In addition, one page of the copy had been printed on different paper and by a different printer. The experts also concluded that the note in the diary was not contemporaneous.

The case was listed originally for an eight-day trial in March 2020. However, the Covid-19 lockdown forced the matter into a three-day hearing with oral evidence restricted to the main witnesses only. Therefore, there was no opportunity for the cross-examination of some witnesses, including the experts.

The Master found in favour of the deceased's uncle and sister, who he described as impressive witnesses. He didn't think they would engage in fraud. Conversely, he found the deceased's mother an unimpressive witness. The Master said he had 'taken account' of the adviser's previous bad character but held that the will was valid on the basis of the documentary evidence and the facts, and nothing in the expert evidence persuaded him otherwise.

Fact finding

When assessing the evidence and making a finding of fact in such cases, the procedure to be adopted by the judge is set out in *Parsonage (Deceased), Re* [2019] EWHC 2362 (Ch), [2018] All ER (D) 34 (Sep). Fact finding commences with the taking of evidence of reliable, contemporaneous documents. To this is added the known, established or probable facts. These must then be considered and built upon by looking at witness evidence consistent with that underlying a body of reliable documentary evidence.

Hearing the appeal, Green J acknowledged that the Master had not had an easy task in reaching his decision. The test in *Parsonage* should be followed where it was possible to do so. In this case, however, there were no 'reliable contemporaneous documents', as all of the documents in evidence were disputed and all were alleged to have been forged. The only undisputed facts were ones that should have given rise to a high degree of suspicion. Consequently, by taking the disputed documentary evidence as the basis for his finding of fact, the Master had erred.

The test in *Parsonage* could not be used as a prescription for fact finding in this case. Consequently, if the Master had relied on his perception of the demeanour of the witnesses and had chosen to believe one side's witnesses over the other, it was incumbent on him to explain his reasons in his judgment. He had not done so. There was no explanation of why he had concluded that the mother was an unimpressive witness, and it was an error not to explore any possible motive she might have had for lying. Finally, the Master had given no explanation of what he meant by taking into account the adviser's 'bad character'.

The expert evidence in this case was strong. It provided powerful evidence that the will had not been signed in 1999. If this, together with the other expert evidence that suggested forgery, was to be rejected, then the appeal court would expect to see clear reasons set out in the judgment. This was particularly true in the circumstances of a reduced trial, and the Master should have made reference to all of the witnesses' statements, stating the importance he had placed on them and whether and why he had accepted or rejected them. This, said Green J, was a serious flaw in the evidential assessment, and more weight should have been given to the expert evidence.

Comment

Although appeal courts will be reluctant to interfere with a judge's findings of fact, the courts must be able to see how the finding of fact has been reached. Accordingly, the appeal was allowed.

In this case, the Master appears to have formed a view based solely on the demeanour of the witnesses who gave oral testimony. Because the expert evidence did not fit with this view, he had rejected it. While he might have had good and just cause for doing so, it is essential that those reasons be identified. Proper and appropriate weight should be given to expert evidence. Where, on the face of it, there is no material evidence to challenge that which has been given, it is incumbent on the judge to identify any reasons that he or she might have for rejecting that expert evidence. **NLJ**

Dr Chris Pamplin is the editor of the *UK Register of Expert Witnesses* and can be contacted on nlj@jspubs.com. Website: *www.jspubs.com*.