

# Larke still ascending

Solicitors should be more forthcoming when faced with a '*Larke v Nugus*' letter challenging a will and play their part in the greater drive to avoid litigation, says **Mike Parker**

**AFTER FIFTY YEARS**, could it be that solicitors are still failing to grasp the well-established principles set out in *Larke v Nugus* (1979) 123 S.J. 337 (CA) and (2000) WTLR 1033? The Law Society seems to think so – a new practice note on the subject has just been published.

It was long ago in 1959 when the Law Society recommended that, where a will drawn up by a solicitor becomes the subject of a dispute, if requested, the solicitor should provide a statement about the execution of the will and the circumstances surrounding it.

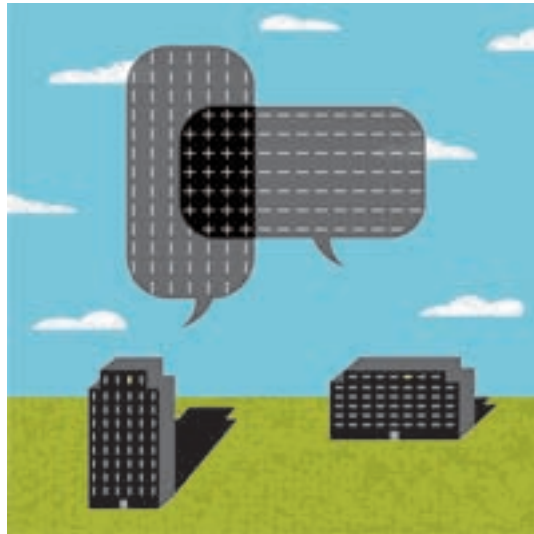
The Court of Appeal endorsed this guidance in *Larke v Nugus* in 1979. A challenge had been made to the validity of the deceased's will on the grounds of lack of knowledge and approval, and of undue influence. The deceased's solicitor did not comply with repeated requests to provide a statement about the execution of the will. Proceedings ensued.

## Principles upheld

Although the validity of the will was upheld, the Court of Appeal confirmed that the solicitor had failed to supply the information he ought reasonably to have given and that a full trial might have been avoided had he complied with the pre-action requests. Importantly, the court made no costs order against those who unsuccessfully opposed the will – their costs came out of the estate.

The significance of the principles was reflected by their inclusion in the now defunct Guide to the Professional Conduct of Solicitors. Surprisingly, there is no reference to the Court of Appeal's decision in the relatively new Solicitors Code of Conduct 2007. Until last month, the only mention of the case in terms of best practice was to be found in the Law Society's practice note 'File Retention' (11 September 2007). Nevertheless, a *Larke v Nugus* request remains the standard form of enquiry for anyone with concerns about the validity of a testamentary instrument drawn up by a solicitor.

The Law Society's new practice note is entitled 'Disputed Wills' (16 April 2009). It clearly sets out the principles of *Larke v Nugus* and



also gives practical advice on a range of related subjects (download it at [www.lawsociety.org.uk/productsandservices/practicenotes/disputedwills.page](http://www.lawsociety.org.uk/productsandservices/practicenotes/disputedwills.page)).

The guidance is very much in keeping with the spirit of the Civil Procedure Rules. It coincides with a new CPR Practice Direction on Protocols that reiterates the requirement for parties in dispute to exchange information and to use litigation as a remedy of last resort.

## Batten down the hatches

With this considerable weight of regulatory and judicial encouragement, perhaps there will now be less resistance among solicitors when a *Larke v Nugus* request arrives in the post. An improvement here is certainly needed. A surprising number of practitioners treat a *Larke v Nugus* request in the same way as a letter before action and batten down their hatches in response, rather than providing the information requested. Even when the Court of Appeal's decision and the Law Society guidance are both explained, sometimes there is remarkable reticence to comply, often accompanied by the attempted imposition of conditions or requests for undertakings on fees. Such a defensive approach tends to create suspicion that the solicitor has something to hide.

There is no prescribed form for the request, although the many precedent examples all tend to cover the same points. A useful

precedent can be found on the website for the Association of Contentious Trust and Probate Specialists (ACTAPS).

The key is to ask questions about the circumstances leading up to the giving of instructions for the will, the instructions themselves and the execution of the document. Ask for copies of any relevant documents as well. As a potential witness in proceedings, the solicitor may not charge for time spent compiling the explanatory statement or the documents, but a charge may be made for photocopying.

## Responding to a request

In terms of responding to a *Larke v Nugus* request, provided there is no suggestion of negligence on the part of the solicitor (when it is appropriate to treat the request as a letter of claim), the response should be as full as possible and delivered promptly. If a longer time period than stipulated is needed to fully comply with the enquiry, it is wise to communicate about this because any sustained period of silence is likely to be treated with suspicion.

The effectiveness of this sort of enquiry relies heavily on the quality of the solicitor's will drafting file. Standards inevitably vary. However, most practitioners appreciate the need to take and retain contemporaneous attendance notes in this area of work. It is rare to discover a complete absence of notes about the drafting of a will.

Half a century after the Law Society first made its recommendations, the relevance of *Larke v Nugus* should not be underestimated. The pressure for early disclosure of material information with a view to obviating litigation is already substantial. It is bound to increase. Solicitors must play their part in this and overcome their reluctance to explain the will-making process. The Law Society has provided a welcome reminder that this is not optional.

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