SIR NINIAN STEPHEN EQT LECTURE
19 October 2016

"THE CONDUCT OF PROBATE LITIGATION'

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THE CONDUCT OF PROBATE LITIGATION

1.0 Introduction

1.1 In the context of modern commercial and equity litigation, the term "Administration and Probate" may be considered as conjuring up a past age of Dickensian legal practice, characterised by such images as dusty will parchments, deed registers buried in concealed will safes and probate clerks clad in tailcoats and wing collars labouring at upright antique desks: somewhat redolent of that archetypal law clerk, Uriah Heep.

1.2 But this image is far from the reality of modern probate litigation practice, which deals routinely with high net worth estates and residue assets generated by current "stratospheric" property values and – happily -increasingly higher share market returns. Against this background, the stakes in contested probate litigation have never been higher, nor harder fought. Hence the creation of a specialist List in the Courts designed to accommodate the specialist requirements the jurisdiction: in the Victorian Supreme Court, now known and described as the "Trusts Equity and Probate List", within the Common Law division of the Court.

1.3 Further, with the enactment of Australia wide Civil Procedure Legislation,[1] which is rigorously enforced by the Courts, no longer do

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[1] In Victoria, the Civil Procedure Act 2010

we have the 19th Century scenario – characterized by a *Jarndyce v Jayrndyce*[2] situation, in which Dickens gave expression to the popular view that the law of probate was "an ass": through which lawyers could, and did, prolong for many years probate litigation in the Courts, to their own benefit and to the disbenefit of its beneficiaries, by *devastavit* of the estate residue.

1.4 Because the expression "probate litigation" on its face would appear to represent a broad church of proceedings – particularly in the context of Chapter III of the Supreme Court (Administration & Probate) Rules 2014 – this paper is limited in its ambit to the practice of litigation concerning issues arising from the administration of deceased estates: that is to say, the commonly understood meaning of "probate" by those who practise within the field.

1.5 In an effort to be more prescriptive of the subject matter of this paper, "probate litigation" is – for practical purposes – divided into two separate heads of proceeding, comprising the two most heavily (by far) litigated fields of Administration and Probate law, namely :

(i) the **caveat** procedure for challenges to the validity of a will pursuant to the provisions of Order 8 of Chapter III of the Rules of Court; and

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2 Charles Dickens – "Bleak House"

(ii) the **family provision** procedure directed to contests as to the adequacy of testamentary provision enabled by Part IV of the *Administration and Probate Act* 1958, ("the Probate Act"), pursuant to the procedures enshrined in Order 16 of Chapter III of the Rules of Court.

1.6 However, in identifying these two fields, it is by no means intended to downplay the significance of other sources of probate litigation as regularly entertained in the Probate List, for example Applications for:

(i) **special forms of grant,** pursuant to Order 5 of Chapter III;

(ii) **revocations** of probate - Order 11 of Chapter III;

(iii) **rectification** of a will - Order 12 of Chapter III;

(iv) **removal of executors** - s.34(1) of the Probate Act; and for

(v) **administration and declaratory relief** in trusts and estates, pursuant to Rule 54 of Chapter I of the RSC.

Indeed, these areas of probate practice provide fertile and regular business in the Probate List, but not – it can be safely asserted – to the numerical extent or frequency generated by **caveat** or **family provision** proceedings, respectively.

1.7 At a further level and within these parameters, this paper focuses on **two particular areas** of probate litigation, which are of special relevance to practitioners regularly operating in the field :

(a) the increasing importance of, and necessity for, the adducing expert evidence in contested probate proceedings, especially caveat proceedings; and

(b) the provisions and application of the ***Civil Procedure Act*** 2010 ("**CPA**").

2.0 **Procedure**

2.1 As an initial observation it is important to identify the proper procedures – as sanctioned by the Rules of Court – for the valid commencement and subsequent conduct of probate litigation, in the context of any given situation.

2.2 In this regard, careful attention must be paid to the interconnection between the relevant **enabling statute(s**) and the **procedural rules** governing the conduct of the particular probate application in issue.

2.3 Thus, as identified at paragraphs 1.5 and 1.6, supra, whilst Chapter III of the Rules applies to *most* probate litigation procedures – including caveat proceedings governed by Order 8 of that Chapter – there are other Rules, and indeed specific legislation which operate in respect of other important fields of probate litigation.

2.4 In particular –

(a) family provision applications enjoy their own head of power under Part IV of the Act, and their own procedural rules under Order 16 of Chapter II of the Rules of Court;

(b) administrative relief in respect of trusts and wills finds its head of power under Order 54 of Chapter I of the Rules of Court; and

(c) for the removal of executors and trustees, one resorts to the discrete statutory heads of power found in ss.34 of the Probate Act and 48 of the Trustee Act respectively.

These are but a few examples of enabling powers (under statute) and procedures (under the rules) for the conduct of probate litigation in particular fields.

2.5 Further, so far as the broad rubric of procedure prescribed within the 12 separate orders of Chapter III are concerned, it is important to emphasise the terms of Rule 1.05 of that Chapter, which relevantly provides as follows:

> "1.05 *Chapter 1 of the Rules of the Supreme Court for the time being enforce and the general practice of the Court apply in relation to a proceeding to which these Rules apply so far as practicable except so far as is otherwise provided by these Rules or any Act.*"

In effect, the general provisions of Chapter I apply, subject to the specific provisions of Chapter III.

2.6 Indeed, going beyond the specific probate procedures governed by Chapter III, it should be further recognised that Chapter I of the Rules

of Civil Procedure constitute the ultimate procedural control overlaying all probate procedure, as with other forms of civil litigation; thus, where a lacuna (or gap) in a particular form of procedure arises in the conduct of an application, then the procedures under Chapter 1 will automatically "kick in".[3]

3.0 **Civil Procedure Act 2010**

3.1 In the short history of its operation in this State since 2010, the CPA has been demonstrated - through an evolving rich vein of case law - to be of critical relevance to the conduct of all civil litigation, in particular probate litigation.

3.2 Soon after its enactment one might have rhetorically asked: how relevant is the CPA to the particular conduct of probate litigation, given the somewhat esoteric status of probate practice and procedure within the broader regulatory framework of the civil law?

3.3 The answer to that question soon returned a definitive "*very relevant indeed*". It has been demonstrated to apply squarely to probate litigation in all its various forms (under both Rules of Court and Statute) and has been directed with equal rigour across the probate field, as with other forms of civil litigation. Perhaps the definitive statement in this regard arises in the recent Court of Appeal decision

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[3] Refer to Rule 1.05, Chapter III R.S.C.

in *Mandie v Memart Nominees Pty.Ltd.* [2016] VSCA 4, a probate decision of the Court of Appeal which established a principle of broad application to not only probate law, but all forms of civil litigation:

> "***The CP Act has changed the litigation landscape***. *One of the main purposes of that legislation is to reform practice and procedure in civil proceedings … More than ever, the focus is now pointedly on efficiency and cost-effectiveness, albeit that they are not the only, nor the predominant, considerations …".*[4]
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> (emphasis added)

3.5 The *Mandie* decision arose from an appeal from the judgment of the Probate List Judge (McMillan J) in an Application(s) for revocation of a Grant of Letters of Administration, and declarations for invalidity of the last three wills of the deceased; for the respondent executor, reliance was placed on s.63 (1) of the CPA as a basis for summary judgment on the grounds of "*no real prospect of success,"* within the meaning of the CPA section.

3.6 Relevantly, the Court of Appeal referred with approval to an earlier (single) judgment of His Honour Justice Lindsay in an NSW Probate decision of *Re Kouvakas,*[5] in which His Honour enunciated the following proposition in regard to almost identical civil procedure legislation :

> "*Recent developments in court administration and techniques for the management of cases cannot be ignored upon the consideration of an application for revocation of an order of the court (albeit an order in the character of a common form grant of administration) regularly made and entered in the records of the*

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4 at para. [42]

5 [2014] NSWSC 786

*court … **the probate jurisdiction has its own dynamic** (but it is not immune to broader concerns about the administration of justice".*

(emphasis added)

3.7 The broader consequences of this principle for the conduct of probate litigation in the context of the CPA are significant for all practitioners, in particular probate practitioners. Both in the commencement and in the conduct of any form of probate litigation, all practitioners (and indeed litigant parties)[6] must be acutely aware of the following statutory mandates:

(a) by s.16, a **paramount duty** is owed to the court to further the administration of justice, not only in the conduct of litigation but also in any associated interlocutory application, any appeal from a first instant judgment and any "*appropriate*" dispute resolution procedure undertaken in that proceeding;

(b) consistent with and in furtherance of that paramount duty, all practitioners (and parties) now have the following **overarching obligations** :

(i) to act honestly: s.17;

(ii) to establish a proper basis for a claim, which cannot be frivolous or vexatious and must be founded on appropriate factual and legal material: s.18;

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6 Refer s.10 of the CPA

(iii) to avoid delay and expense and to only take steps required to facilitate resolution or determination of the dispute in question: s.19;

(iv) to co-operate with other parties to the litigation and the Court, in the conduct of the proceeding: s.20;

(v) not to engage in misleading or deceptive conduct in the proceeding: s.21;

(vi) to use all reasonable endeavours to resolve the proceeding, unless it is not in the interest of justice or where judicial determination is the only viable alternative to the conduct of the proceeding: s.22;

(vii) to use all reasonable endeavours to narrow the issues in dispute : s.23;

(viii) to use reasonable endeavours to ensure that legal and other costs are reasonable and proportionate to the complexity of the proceeding and the amount of costs in dispute: s.24;

(ix) to use reasonable endeavours to ensure **prompt conduct** of the proceeding and to act promptly and minimise delay: s.25;

(x) to disclose to each party to the litigation, within reasonable time, all documents that are or have been in that person's custody, possession or control –

(a) of which that party is aware; and

(b) that party considers critical to resolution of the dispute.

s.26.

3.8 Apart from these serial "*overarching obligations,"* the CPA is otherwise replete with provisions directly relevant to the **conduct of civil litigation**, including and **in particular probate litigation**. In that regard I proceed to identify what I consider to be three critical CPA provisions of particular importance to practitioners in the probate field.

3.9 **First,** the *sanction provisions* under s.29 of the CPA which provide the Court with wide discretionary powers to make certain orders in the event of a Court finding that the overarching obligations have been breached in the conduct of the particular litigation. In that regard the Court of Appeal in the seminal decision of *Yara Australia Pty.Ltd. v Oswal* [2013] VSCA 337 held that the section conferred broad and flexible powers intended to make all those involved in the **conduct** of litigation – parties and practitioners – accountable for the just, efficient, timely and cost effective resolution of disputes.[7]

3.10 More recently – and of direct relevance to the issue in question - in *Brown v Guss (No. 2)* [2015] VSC 57, the probate judge considered the

7 [2013] VSCA 337 at [20]

disposition of costs under s.29 in circumstances where the defendant and his father, a solicitor, were found to have wrongfully challenged the validity of a relative's will on grounds of testamentary capacity, want of knowledge and approval and undue influence, in wholly unmeritorious circumstances. The Court applied the full weight of the section against the defendant and his solicitor father (found, in effect, to have operated as an inter meddler), and consequently mulcted them with indemnity costs: as the trial had been lengthy and somewhat complex in terms of evidence and issues of law, one can only speculate that the costs burden was substantial indeed. In so ordering, her Honour acted upon the strong dictum of the Victorian Court of Appeal in *Yara v Oswal* (supra,@ [3.9]) as follows :

> "*… in our view, the enactment of s.29 together with s.28(2) imbues the Court with broad disciplinary powers that may be reflected in the costs orders that are made.* ***The Court is given a powerful mechanism to exert greater control over the conduct of parties and their legal representatives, and thus over the process*** of civil litigation *and the use of its own limited resources. The Act does not merely reaffirm the existing inherent powers of the Court but provides a powerful indication of the will of the Parliament about the values sought to be achieved by the way in which cases are managed in the Courts and the balances that have to be struck".*[8]
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> (emphasis added)

3.11 **Secondly**, attention is drawn to the case management provisions contained in Ss. 48 and 49 the CPA, concerning the Court's broad powers to make orders concerning the interlocutory **preparation** for (s.48), and **conduct** of the hearing of the proceeding (s.49). Each of

[8] [2013] VSCA 337

these sections describes with specificity the manifold powers of the Court to govern the conduct of a proceeding "*to further the overarching purpose … in relation to the conduct of a hearing"*[9]

3.12 **Thirdly**, practitioners should also pay particular attention to the powers of summary judgment conferred on the Court by s.63(1) of the Act[10] -

"… if the Court is satisfied that a claim … has no real prospect of success".

3.13 There is nothing new of course in the exercise of a Court's discretion to give summary judgment, upon application, in appropriate cases: it has always existed within the framework of Rule 23.01 of the RSC and under the inherent jurisdiction. But the enactment of the CPA seems, in the opinion of the presenter, to have operated as a "*clarion call"* to interested practitioners by focussing upon the statutory context of the *Civil Procedure Act* and the ***overarching imperative*** to reduce the time and costs of litigation. Indeed, it is observed "the ink was barely dry" on the new CPA legislation when Habersberger J determined to *summarily dismiss a probate claim* pursuant to s.63(1) of the CPA, upon the application of an alert practitioner for the respondent.[11]

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9 CPA s.49(1)

10 Part 4.4 of the CPA

11 *Van Wyk v Albon* (2011) VSC 120

3.14 In summary under this head, it can be said with some degree of confidence that Part 4.4 of the CPA has definitely: "....c*hanged the litigation landscape"* (to quote the Court of Appeal in *Mandie v Memart Nominees),* insofar as the conduct of the summary dismissal procedure is applied to probate litigation.

4.0 **Expert Evidence**

4.1 The issue of expert evidence is, in the presenter's opinion, of fundamental importance to the proper conduct of contested probate litigation, in circumstances where it is both necessary and relevant to the issue(s) in dispute. Concomitantly, it is an area to which insufficient emphasis is accorded, and in many cases can alter the outcome of the litigation: this is particularly so in the conduct of contested caveat proceedings under Rule 8 of Chapter III.

4.2 The legal constraints as to the nature, admissibility and weight of expert opinion evidence in the conduct of civil litigation are well recognised, but in recent years have become increasingly refined, both under statute,[12] and the rules of court.[13] This is perhaps not surprising given that the evidence of an expert may, and in some cases will, significantly influence the outcome of the litigation: particularly so where there is no or no adequate *direct evidence* of a

12 Uniform Evidence Law, Victoria 2008; Civil Procedure Act Vic 2010 part 4.6;
13 Rule 44 RSC Vic

critical fact in issue, or on the general issue in question in the proceeding itself.

4.3 The proposition is no less compelling when applied to the conduct of litigation in a Court of Probate: in particular, in Caveat proceedings concerning the validity of a will.

4.4 Expert evidence is a subset of Opinion evidence which, in the normal context, is not evidence of a *fact in issue*: for that reason, opinion evidence is not generally admissible as evidence in any civil proceeding, because it is the Court itself which is ultimately required to make findings of fact and law: the opinion of an individual witness is neither.

4.5 Thus, s.76 of the *Uniform Evidence Act* 2008 (Vic) ["the Act"] provides as follows :

> "*s.76. The Opinion Rule*
>
> *Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed".*

But whilst s.76 creates a *prima facie* rule for the exclusion of opinion evidence, s.79 thereafter operates to establish the exception to that Opinion rule, based on the concept of "specialised knowledge". It provides :

> *"s.79(1) If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge."*

4.6 It is in the context of this specialised knowledge exception that the Rules of Court have created specific rules to govern the procedure for, and admissibility of, expert evidence in all civil proceedings, derived from the evidentiary foundation established in s.79 of the Act.

4.7 In Victoria, and consistently with the rules of the Supreme Courts of other States containing like provisions as to expert evidence, Order 44 of the Victorian Supreme Court rules constitutes a "one stop" code governing the procedure, admissibility and operation of expert evidence in all civil courts of Victoria: this includes, of course, Courts which exercise the **Probate jurisdiction**.

4.8 In particular, O. 44(3) operates in two essential ways to regulate the adducing of expert opinion evidence in civil litigation:

(a) **first**, it stipulates the ***procedural*** steps required for the *timing and format* of expert witness reports (statements of evidence), and the mandatory application of the Expert Witness Code of Conduct enshrined in Form 44A;

(b) **Secondly**, it stipulates the ***substantive*** requirements which operate as a precondition to the acceptance of expert evidence

(and the witness giving that evidence) in the relevant proceeding, including as follows:

- the qualifications of the witness to prepare the report: sub-rule 2(c);
- the facts, matters and assumptions on which the opinion is based (including a letter of instructions) – 2(d);
- the reasons for the opinion, and any literature of other materials used in support of it – 2(e);
- whether a particular question, issue or matters falls outside the expertise of the expert – 2(f);
- any examination test or other investigation on which the expert has relied – 2(g);
- a declaration that the expert has made all enquiries which he or she believes are desirable and appropriate, and that no matters of significance which the expert regards as relevant have, to his or her knowledge, been withheld from the court – 2(h).

4.9 Each of these foregoing conditions operate and apply, *mutatis mutandis*, to the report and evidence of an expert witness called to provide evidence in probate litigation.

4.10 Unlike other forms of probate litigation, where issues of fact can usually (if not readily) be established by lay evidence of witnesses and

objective documents evidencing the facts, **caveat proceedings** invariably arise from the direct circumstances in which the testamentary document is executed, and which necessarily therefore involves the state of mental and physical health of the (now deceased) will maker.

4.11 Whilst the evidence of those attendant upon the willmaker at and around the time of its preparation and execution is obviously relevant to the issue of testamentary capacity, more often than not issues of dispute arise as to the proper interpretation and application of those facts: particularly between lay witnesses who may (or may not) be substantial beneficiaries to the bounty of the willmaker; but also disputes as to the circumstances in which the last will was prepared and executed, usually by a lawyer.

4.12 Against this background, empirical experience and the decided case law demonstrate that two particular forms of expert opinion evidence will assume critical relevance :

(a) medical evidence as to the state of health – in particular mental health – of the willmaker at and around the time of execution of the testamentary instrument; and

(b) the procedures, conduct (and competence) of the person – usually a solicitor - who took instructions for the preparation and execution of the disputed will : this is particularly relevant

in cases where the ground of "suspicious circumstances" is relied upon as the basis of challenge to validity.

4.13 It is important to commence any review of the relevant case law with a seminal proposition concerning the fundamental question of proof in caveat proceedings. The dictum most commonly cited and relied upon for this purpose is that of the former Chief Justice of the High Court, Gleeson CJ in *re Griffith*; *Easter v Griffith* (1995) 217 ALR 284, at 289-290:

> "*Where the evidence in a suit for probate raises a doubt as to testamentary capacity, there rests upon the plaintiff the burden of satisfying the conscience of the court that the testatrix had such capacity at the relevant time. If, following a vigilant examination of the whole of the evidence, the doubt is felt to be substantial enough to preclude a belief that the testatrix was of sound mind, memory and understanding at the time of execution of the will, probate will not be granted.*[14] *This formulation of the onus of proof, well established by authority and not in dispute in the present case, invites caution. The power to freely dispose of one's assets by a will is an important right, and a determination that a person lacked (or, has not been shown to have possessed) a sound disposing mind, memory and understanding is a grave matter.*"

4.14 Thus the onus of proof in caveat proceedings must always rest upon the propounder of the disputed document, to demonstrate to the court on the balance of probabilities that such document was the product of (to use the words of Gleeson CJ) –

> "*a sound mind, memory and understanding at the time of execution of the will*".

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14 *Worth v Clasohm* (1952) 86 CLR 439

In the usual case of a caveat proceeding, of course, the propounder is the plaintiff to the litigation.

4.15 In many, if not most, cases this onus of proof may be discharged by lay evidence or, evidence of the willmaker's treating (that is, non-expert) medical practitioner: such evidence is normally more acceptable to the Probate Court than that of an expert medical specialist previously unacquainted with the deceased will maker and who, of necessity –

> *"… is compelled to rely on secondary evidence in the making of his or her assessment."*

Nicholson & Ors. v Knaggs & Ors. [2009] VSC 64 at para. 39.(per Vickery J)

4.16 The judicial rationale for this approach is well enunciated by his Honour Justice Windeyer in the NSW case of *Revie v Druitt:*[15]

> "*As I have pointed out quite recently in Kerr v Badran lay evidence of the activities, conversations, family circumstances and relationships of the deceased and evidence from doctors, often general practitioners who were treating doctors during the lifetime of the deceased, usually is of far more value than reports of expert specialist medical practitioners who have never seen the deceased".*

4.17 Such an approach is entirely understandable and is not to be gainsaid. But the application of the proposition can only operate in

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15 [2005] NSWSC 902 at 34

circumstances where there is **cogent independent evidence** that a willmaker was exercising –

> "*a sound mind, memory and understanding at the time of execution … to freely dispose of one's assets"*

(per Gleeson CJ in *Easter v Griffith*, supra).

4.18 For this purpose, in **many will making situations such direct evidence may not be readily available to the court for a variety of reasons**, for example:

- there may be no treating doctor available or prepared to give relevant contemporaneous evidence as to the soundness of mind of the will maker: in particular, in these days of a highly controlled (and highly insured) medical profession, it is a matter of notorious fact that hospital doctors will decline to express an opinion on testamentary capacity, and indeed frequently refuse to become involved at all – even though, as appears from the hospital records, he/she had regular ongoing contact with the will maker at the relevant time(s);
- the only available lay evidence may be that of a person(s) who stands to gain benefit(s) under the will and therefore can in no way be considered an objective witness to the relevant issue(s) of fact concerning capacity and due execution;
- whilst there may exist medical or hospital records as to the deceased's condition shortly prior to and at the time of death,

absent the opportunity for cross examination on those documents, their contents will frequently be open to different construction and interpretation, and be subject to contradiction from the other contemporaneous documents such as to raise serious doubt in the mind of the Probate Court;

- further, it is not uncommon for a terminally ill will maker to have been on a programme (or "cocktail") of mind altering medication in the days, or indeed hours' immediately relevant to execution of the testamentary instrument, the cumulative effect of which could raise serious doubt as to the capacity of the will maker; this is a matter which could only be known to a medical expert in the particular field, for instance in neurology, pharmacology or palliative care: the court would need such expert evidence to enable it to make a fully informed decision on the ultimate issue of disputed fact.

4.19 It is in such cases – that is, where there is a clear lacuna in the availability of cogent lay or (treating) medical evidence – that the importance of an objective, specialised expert witness comes to the fore.

4.20 Apart from any other consideration, it is important for the probate judge to hear from such an expert in circumstances where the lay or medical evidence falls short to enable the court to form its judgment

on the discharge of the onus.. True it is, of course, that if the propounder cannot adduce sufficient evidence to discharge the onus of proving capacity at the relevant time, the contradictor can simply rely on that failure as the requisite lack of proof on the ultimate issue: that is, testamentary incapacity; but it is so much more definitive, and of benefit to the presiding judicial officer, to have the positive evidence of an independent expert witness, properly briefed and instructed, to provide ultimate satisfaction on the onus question.

5.0 **Non-Medical Expert Evidence**

5.1 Whilst discussion thus far has concentrated upon the issue of independent medical expert opinion in caveat proceedings instituted pursuant to Rule 8 of Chapter III (and also, where relevant in Family provision cases) it is to be recognised that opinion evidence in two other particular fields of expertise are often resorted to in caveat litigation, and are more commonly the subject of consideration in the decided cases than other non-medical fields.

5.2 *Legal Practitioners*

This will arise where a critical issue in determining the validity of the disputed will – again, most often in the "suspicious circumstances" - is the conduct of the attending solicitor who took instructions for and prepared the will, and/or attended upon the willmaker for its ultimate execution. Expert evidence pursuant to O.44 will be called from a

senior, recognised practitioner/solicitor in the field to give expert opinion evidence on the duties and conduct of the solicitor who attended upon the testator/trix at the relevant time(s).

5.3 This issue was the subject of detailed examination in the recent Victorian Court of Appeal decision in *Veall v Veall* [2015] VSCA 60, at paragraphs 184-192.[16] I recommend a careful review of that decision by all interested practitioners.

5.4 *Handwriting Experts*

Handwriting experts are frequently called upon to assist the Court to identify and/or interpret handwritten script on the face of the will or a related testamentary document, so as to dispel (or otherwise confirm) the existence of suspicious circumstances existing shortly prior to and at the time of execution.[17]

6.0 **Procedural Matters – Expert Evidence**

6.1 Reference has previously been made (at [4.2], supra) to the provisions of Rule 44 of the Rules of Court, in the context of expert opinion evidence. As that rule provides a comprehensive scheme for adducing of expert evidence in civil litigation, the precise terms of that Rule – and its various sub-rules – must necessarily be the "first port of call"

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16 See also the UK authorities referred to in the *Veall* footnotes 109-123, inclusive

17 See, for example, *Zivojan v Babic* [2013] VSC 57, and *Burnside v Mulgrew* [2007] NSWSC 550

for all practitioners confronted with an expert evidence issue in the conduct of caveat proceedings.[18]

6.2 However there are two other important procedural provisions directly relevant to the adducing of expert opinion evidence in civil litigation - of particular relevance to probate litigation - which need to be borne in mind by all practitioners.

6.3 **First** the **Civil Procedure** requirements for calling opinion evidence, as enshrined in Part 4.6 of the *Civil Procedure Act* 2010 (CPA).[19] Two particular subsections of that Part are relevantly noted:

(a) **s.65G(1)**, which requires a party seeking to adduce expert evidence to seek directions from the Court *as soon as practicable*; and

(b) **s.65Q**, which generally governs the interaction of the CPA provisions in Part 4.6 with the case management powers of the presiding court (in this case, the Supreme Court pursuant to Chapter 1I1).

6.4 **Secondly**, the provisions contained in Rule 8.08 of Chapter III itself: in effect, that sub-rule constitutes a "mini code" for the conduct of

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18 The comprehensive notes to Rule 44 contained in Volume 1 of ***Williams – Civil Procedure*** are strongly recommended as an important reference point to the operation of the Rule

19 ss 65F – 65Q, inclusive, *Civil Procedure Act* 2010

directions hearings generally ***in caveat proceedings***, including the following procedural matters :

- joinder of other parties;
- grounds of objection;
- pleadings;
- filing and service of affidavits; and

"(b) ***any other direction for the conduct of the proceeding*** *which the Judge of the Court thinks conducive to its effective, complete, prompt and economical determination* (emphasis added).

These specific procedural powers are to be read in conjunction with the broader case management powers vested in the Court by Part 4.2 of the CPA: in the given situation of a caveat proceeding one would imagine that the specific provisions of R8.08 would take precedence in the event of any inconsistency.

6.5 Thus, in addition to the *substantive* provisions of O.44 of the RSC concerning the form and content of expert opinion evidence, the *procedural* provisions of Part 4.6 CPA and R.8.08 of Chapter III must at all times be considered by practitioners when embarking upon the prosecution or defence of caveat proceedings in the Court.

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19 October, 2016.