CAPACITY DISPUTES

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Introduction

1. When a Court approaches a challenge to a Will based on lack of capacity, there are in general three elements to the evidence which will inform its decision. The first, and in my view, most important is the evidence of the solicitor who took instructions for the Will. The second is the anecdotal evidence of friends, family, carers, G.Ps and indeed anyone who had dealings with the deceased which can provide to the Court a picture of the failing mind of the deceased. The third element is the expert evidence.

2. It is important to build up a picture relying on as many of these forms of evidence as are available. The reality is that Courts are reluctant to find wills invalid.

3. Before turning to the questions of evidence and particular cases, I want to deal briefly with the test for capacity.

What is the test for capacity?

4. Going back to basics, the test is that in *Banks v Goodfellow*[1]. Essentially to satisfy the test of capacity the testator:-

(1)needs to have capacity to understand that he is making a will, and that it will have the effect of carrying out his wishes on death;

(2) must be able to understand the extent of the property he is disposing of;

(3) must recall those who have claims on him and understand the nature of those claims[2] so that he can both include and exclude beneficiaries from the will.

(4) no disorder of the mind should poison his affections, pervert his sense of right or prevent the exercise of his natural faculties and no insane delusions should influence his will or poison his mind.

5. Notwithstanding its antiquity, The Court of Appeal has in more recent times stated that this was the appropriate test still and could not be better set out[3].

6. Since the passing of the Mental Capacity Act 2005 there has been something of a debate in the Courts as to whether the test for capacity in the Act supersedes

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1 **(1870) LR 5 QB 549 at 565**
2 *Boughton v Knight* (1873) 3 P & D 64
3 *Sharp v Adams* [2006] WTLR 1059 para 82

Banks v Goodfellow[4]. There is no doubt that there are differences between the statutory and the common law tests. The first and most obvious is that under the Act, there is an assumption that a person has capacity. This was a factor which was noted by the deputy judge in *Scammell v Farmer*[5] who rejected the application of the Act to a will made and a death which occurred before it came into force. The second distinction possibly arises from section 3(1), which requires a person to be able to understand all the information relevant to the making of a decision. This point impressed the deputy Judge in *Re Walker*[6] who in an impressively reasoned judgment held that the Mental Capacity Act had no application to capacity disputes. In any event, it seems to me that the *Banks v Goodfellow* test requires the testator to be able to understand all the information (as set out in that test) relevant to the making of a will.

7. A third, and in my view, more significant difference is found section 3(4), which requires the testator to be able to understand, use or weigh information as to the reasonably foreseeable consequences of the choices open to him. That does appear to be at odds with the common law test as it currently stands as set out by the Court of Appeal in *Simon v Byford*[7].

8. The latest word on the subject has come from HHJ Matthews in *James v James*[8] who followed *Re Walker*. While the intellectual reasoning for the conclusions in

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[4] (1870) LR 5 QB 549 at 565

[5] *Scammell v Farmer* [2008] EHWC 1100; [2008] WTLR 1261

[6] *Re Walker* [2014] EWHC 71 (Ch); [2015] WTLR 493

[7] *Simon v Byford* [2014] EWCA Civ 280; [2014] WTLR 1097

[8] [2018] EWHC 43

these two cases is hard to fault, the practical implications are that the test for deciding whether someone lacks capacity to make a will during their lifetime, differs from the test as to whether they lacked capacity when a Will is challenged after their deaths. It is something the Law Commission has consulted on in its proposals for the reform of the law of Wills.

The Vital Importance of the solicitor taking instructions

9. In *Burgess v Hawes*[9], Mrs. Burgess made a will aged 78 which cut out her son – one of her three children. Her son had recently bought her a bungalow to live in and for the first time in her life she had money. The Will was made in January 2007 and the evidence called on behalf of her son and daughter who supported him painted a clear picture of sharp deterioration in 2006 with the Deceased being forgetful, failing to recognise people she knew well, incontinence and lack of hygiene about which she did not care. There were contemporaneous e-mails at the relevant time which recorded all this.

10. Instructions for the Will were given prior to Christmas 2006. The Deceased's other daughter (who had fallen out with her brother) made the appointment with the solicitors and attended with her mother. The Court found she stayed throughout the interview and contributed to the instructions given, which bore no relation to what was in fact the arrangement between mother and son. No draft Will was ever sent out to Mrs. Burgess and she was taken to execute it when poorly after a fall at Christmas which may have been a stroke.

[9] [2013] EWCA Civ 94; [2013] W.T.L.R. 453

11. Only the Claimants challenging the Will called medical evidence in the eminent guise of Professor Jacoby who concluded that the Deceased had established cerebrovascular disease which provided evidence that she suffered from vascular dementia which would have resulted in the behaviour recorded by the Claimants and their witnesses. He expressed the view that if the Court concluded that she excluded her son on erroneous grounds, then it would probably have been due to her disorder of mind.

12. There was also evidence from the Will draftsman who had no independent recollection of the meeting or the will drafting process. He had described her in his attendance note as "compos mentis" but had applied no particular test, and accepted he could not assess her capacity as well with another person in the room.

13. The Court found that Mrs. Burgess lacked capacity at the time she made the Will or in the alternative did not know and approve the contents. The Court of Appeal did not share the Judge's view on the question of capacity although it dismissed the appeal on the basis that the will should be set aside for lack of knowledge and approval. Mummery LJ went so far as to say that a Judge should be slow to find that a testator lacked capacity where the will draftsman considered that he or she was capable:-

'My concern is that the courts should not too readily upset, on the grounds of lack of mental capacity, a will that has been drafted by an experienced independent lawyer. If, as here, an experienced lawyer has been instructed and has formed the opinion from a meeting or meetings that the testatrix understands what she is doing, the will so drafted and executed should only be set aside on the clearest evidence of lack of mental capacity. The court should be cautious about acting on the basis of evidence of lack of capacity given

by a medical expert after the event, particularly when that expert has neither met nor medically examined the testatrix, and particularly in circumstances when that expert accepts that the testatrix understood that she was making a will and also understood the extent of her property.'

14. In *James v James* both expert witnesses agreed that the testator, a farmer, was suffering from moderate dementia when he made his Will. They agreed that whether or not he had testamentary capacity was so finely balanced that they understood why the other had come to the opposing view. What swung the case in favour of the validity of the Will was the evidence of the solicitor who drew up the Will and gave evidence that the testator had capacity. She was a good witness, and kept excellent attendance notes. While she came in for some criticism for failing to observe the golden rule to have the testator examined medically when she was aware there was an issue over his capacity, it was not enough for the court to reject her evidence that in her view the testator was capable of making a Will.

15. However, a Will may be held to be invalid notwithstanding the most careful precautions being taken by a solicitor. In *Sharp v Adam*[10] which involved a testator with motor neurone disease, the solicitor who drafted the Will was praised for the care she had taken and the fact that she had involved a medical expert but the fact that the Will cut out the Testator's daughters with whom he had a good relationship and medical evidence that he might not have had capacity resulted in the Will not being admitted to probate. The disorder from which he suffered affected his personality which led the Court to conclude that he lacked capacity.

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[10] [2006] EWCA Civ 449; [2006] WTLR 1059

16. A case where the solicitor came in for criticism was in *Key v Key*[11]. Briggs J found that he had not done a good job in taking instructions from a man who had recently lost his wife. The Will was held to be invalid.

17. There have been a few cases where the Will has not been drawn by a solicitor, the testator has been of dubious capacity but the Court has still admitted the Will. One example is *Blackman v Man*[12] where the testatrix who suffered from dementia filled in a Barclays Bank will form to dispose of her £10m estate. The other was *Simon v Byford*[13]. That case involved a challenge to a Will made in rather unusual circumstances based on the third limb of *Banks v Goodfellow*. Mrs Simon had four children, one of whom predeceased her. The disputed Will was prepared and executed at Mrs Simon's 88th birthday party, at which two of her children were present but not her son Robert who benefited more than his siblings under an earlier Will of 1994 in that shares which would give him a controlling interest in the family company which he ran were left to him. The Will was prepared and executed without the involvement of a solicitor and without any medical assessment of her capacity to make a will, despite the fact (as was common ground) she was by that stage suffering from mild to moderate dementia. The Court at first instance upheld the Will as did the Court of Appeal. The Court accepted that Mrs. Simon was not capable of remembering why she had favoured one of her children in her earlier Will by the time she made the disputed Will. The Court of Appeal rejected the argument that this was a finding which meant that she could not fulfil the third *Banks v Goodfellow* limb because while she might be able to identify those with a claim on her bounty she could not assess and

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[11] [2010] 1 W.L.R. 2020

[12] As yet

[13] [2014] W.T.L.R. 1097

weigh those claims properly. Lewison LJ stated: "*I do not believe that previous authority goes to the length of requiring an understanding of the collateral consequences of a disposition as opposed to its immediate consequences. Nor do I think it desirable that the law should go that far.*"

Anecdotal Evidence

18. Evidence from family, friends, carers, G.Ps, social workers, nurses and indeed anyone who came into contact with the testator can be useful. It does of course have to be looked at in the context of the other evidence but odd behaviour can be important although not decisive.

Expert Evidence

19. The role of the expert in capacity cases is to express an opinion as to the impact of the underlying illness on the ability of the testator to understand the various factors required to make a Will. Sometimes there will not have been a diagnosis of any illness and then the expert may have an even harder job in seeing whether the medical notes for the testator point to a particular disease which might have had an impact on the capacity of the testator.

20. It is the expert's role to express an opinion. It is not for the expert to decide whether or not the testator had capacity. That is a legal question based on all the evidence evaluated by the Court. The attempt by an unfortunate expert to usurp

that function was firmly slapped down in *Otuka v Alozie*[14] where the Deputy Judge said:-

> *'In a report dated 5 October 2005 he concluded in the final paragraph that on the balance of probabilities the testator " did not have testamentary capacity at the material time ".*
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> *That statement was unfortunate for more than one reason. First, it is inappropriate for an expert witness to be asked or permitted to express a view of that sort, involving as it does the application of a legal standard to undetermined facts to determine the very matter entrusted to the decision of the court. Second, and more substantively, when Dr Isaac came to give oral evidence it became clear that the opinion expressed in his report was based on a fundamental misapprehension of the medication being taken by the testator on 10 February 2002. In brief, he had assumed that the testator was then receiving significant doses of diamorphine (heroin), cyclizine (a powerful antihistamine), and midazolam (a potent benzodiazepine tranquillizer), which would have had strong sedative and cognitive impairing effects. The medical records made however clear, and it was not in dispute, that none of this medication was prescribed until two days later, on 12 February 2002'.*

21. Some experts in this field have taken that judgment very much to heart and disclaim in their reports any attempt to usurp the function of the Court. However, they do have to express an opinion as to whether the testator had capacity when the Will was made. Briggs J (as he then was) said

> *'Finally, the issue as to testamentary capacity is, from first to last, for the decision of the court. It is not to be delegated to experts, however eminent, albeit that their knowledge, skill and experience may be an invaluable tool in the analysis, affording insight into the workings of the mind otherwise entirely beyond the grasp of laymen, including for that purpose, lawyers and in particular judges. In the present case, both Dr Hughes (in his oral evidence) and Professor Jacoby (in his report) left me in no doubt that they both understood this limitation upon their role. Although they were both forthcoming in expressing their opinions, neither of them made any attempt to usurp the proper function of the court in that respect. Their contribution was of great assistance.'*

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[14] [2006] EWHC 3493

22. There has been some suggestion by the Court of Appeal that expert evidence in these cases is not of great assistance in *Burgess v Hawes* discussed above.

23. That view does not of course chime with that of Briggs J in *Key v Key* who found the experts to be of great assistance. It seems to me it is wrong to dismiss expert evidence in capacity cases in such a way. Mrs. Burgess had not been formally diagnosed with dementia during her lifetime but her medical notes led Professor Jacoby to the view that she had been suffering from vascular dementia which was consistent with the anecdotal evidence of some witnesses as to her mental deterioration.

24. After *Otuka v Alozie* there was some question as to whether it was appropriate to show experts the lay witness evidence when preparing their reports. It was felt this might influence them improperly to come to a conclusion on capacity whereas their role was to assist the Court by expressing an opinion.

25. The difficulty is that psychiatrists assess capacity by looking at behaviour. Ideally they do that by meeting the patient but if looking at matters retrospectively, it is difficult to see how they cannot be assisted by looking at what witnesses observed of the testator. Of course, they must be circumspect and must not assume the evidence will be accepted but it ought to assist in many cases in enabling them to form a view.

Types of Incapacity

26. If I can alter Tolstoy's quote slightly, capacitous individuals are all alike; every person lacking capacity does so in his own way. A diagnosis of any mental illness including dementia does not answer the question of whether the testator had capacity unless the dementia is so severe that it is clear that the testator could not have had capacity. That is why mini-mental state examination results are simply part of the picture. They are a blunt tool that perhaps gives the expert some guidance on where a patient's dementia falls on a particular scale but that is all.

27. *Key v Key* referred to above is an interesting case because the testator's lack of capacity stemmed not from dementia but as a result of the impact of the recent death of the testator's wife. Briggs J heard evidence from Dr. Hughes (who had the advantage of seeing the testator while he was alive) and Professor Jacoby. He accepted the evidence of Dr. Hughes as being more valuable than that of Professor Jacoby who had not had the advantage of seeing the testator, while of course acknowledging his eminent standing. He said:-

> *'Without in any way detracting from the continuing authority of Banks v Goodfellow , it must be recognised that psychiatric medicine has come a long way since 1870 in recognising an ever widening range of circumstances now regarded as sufficient at least to give rise to a risk of mental disorder, sufficient to deprive a patient of the power of rational decision-making, quite distinctly from old age and infirmity. The mental shock of witnessing an injury to a loved one is an example recognised by the law, and the affective disorder which may be caused by bereavement is an example recognised by psychiatrists, as both Dr Hughes and Professor Jacoby acknowledged. The latter described the symptomatic effect of bereavement as capable of being almost identical to that associated with severe depression. Accordingly, although neither I nor counsel has found any reported case dealing with the effect of bereavement on testamentary capacity, the Banks v Goodfellow test must be applied so as to accommodate this, among other factors capable of impairing testamentary capacity, in a way in which, perhaps, the court would have found difficult to recognise in the 19th century'.*

28. In *Vegetarian Society v Scott*[15] the testator was suffering from schizophrenia and logical thought disorder. In spite of being a meat eater he left 80% of his estate to the Vegetarian Society. His appearance was unkempt and tramp-like, his living conditions were below basic and he kept an annotated school geography book containing mostly incoherent writings from the mid-1960s onwards. Nevertheless the Will was found to be valid. Professor Jacoby gave evidence for the Vegetarian Society and the Court said:-

> *'Professor Jacoby considered that the evidence of the circumstances in which the wills were made and also of various property transactions conducted at and around the same time, shows that Mr. McKeen's schizophrenia and thought disorder did not prevent him from having logical thoughts, and that he could and did gather his thoughts when he wanted or needed to for "goal directed activity" (a phrase used by Professor Jacoby), such as making a will.'*

29. The case illustrates the fact that even severe mental illness affecting the way a testator lives his life will not necessarily denote lack of capacity. Physical ailments which have an impact on capacity have also provided interesting issues for the Courts to decide-for example *Sharp v Adams* referred to above..

30. *Banks v Goodfellow* was a case about a testator who suffered from delusions. There are interestingly not many modern cases on that subject. However, the impact that insane delusions can have on the capacity of a testator was recently examined in the case of *Kostic v Chapman*[16] where the testator, Bane, left his £8m estate to the Conservative Party, cutting out his son Zoran. It was common ground that from the mid 1980s until the end of his life he suffered from a serious and

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[15] [2013] EWHC 4097 (Ch); [2014] W.T.L.R. 525;

[16] [2007] EWHC 2298

untreated mental illness that took the form of a delusional disorder. In particular, he believed that there was an international conspiracy of dark forces against him in which he believed family members were implicated. The point was whether those delusions were material to the decisions he had to make about his Will. It was held that they were.

31. Finally, although there are few cases on the subject, there is no reason why incapacity cannot be induced by alcohol or drugs.

Summary

32. To answer the question, posed: what evidence of (1) distorted memories, (2) false beliefs and (3) personality change is likely to persuade the court and secure a successful outcome? That is extremely difficult. The Court strives to find for wills and dementia or other debilitating mental illness such as schizophrenia will not necessarily do it, even when there is an expert report saying that the testator was unlikely to have had capacity.

33. If a solicitor has done a reasonable job, then the task becomes so much the harder.

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