TRUST LAW

Assessing testamentary capacity: an update on *Banks*

By Anthony Grant

In *Banks v Goodfellow* (1870) LR 5QB 549, Cockburn CJ set out a test to establish whether a person has testamentary capacity. It met with universal approval and was adopted by judges throughout the Commonwealth where it remains the applicable test today.

Although there have been huge advances in medical science since 1870, the test has not been altered substantially. It should be noted, though, that in *Loosley v Powell* [2018] 2 NZLR 618 our Court of Appeal said the checklist of factors in the *Banks* decision were to be regarded "as guiding propositions rather than as a formula".

Fitzgerald J considered the test for testamentary capacity in unusual circumstances in *Dodssuweit v Olivier* [2019] NZHC 1226. Two weeks before a Mrs D died in 2017, she made various gifts and executed a new will, the effect of which was to benefit her daughter to the detriment of her two other children.

A week before she made the gifts and the will, Mrs D was admitted to a mental health unit on the basis that there were reasonable grounds for believing she was mentally disordered.

She had an unusual personality and was described as being "eccentric, dramatic, melodramatic... and as having obsessional traits". Her son said she had been seriously contemplating suicide in the days before her death. A doctor who treated her shortly before she died said she believed her son was persecuting her and that she had "repeatedly asked [the son] to help her die".

The two children who were disadvantaged sought to set aside the gifts and the will on the grounds that Mrs D had lacked sufficient mental capacity.

Both claims were rejected by the court.

When I read this case recently, it brought to mind the case of *Key v Key* [2010] EWHC 408 (Ch) a decision of Mr Justice Briggs.

Key had been married to his wife for 65 years. When she died in November 2006 he was devastated. His GP described him as "desperate, not sleeping" and needing a "full social care package." The doctor also said: "I think he is high risk as he was so dependent on his wife." He said Key had been "extremely distressed" and he "would have concerns in terms of him making decisions at this time, because of his emotional state after losing his wife".

A week after the wife's death, one of Key's daughters took him to see a solicitor where she arranged for him to make a new will under which she and her sister would take the bulk of his estate. The will was in sharp contrast to his previous will.

The disadvantaged sons contended that the will was made when Key lacked testamentary capacity, an argument that was upheld by Mr Justice Briggs in a decision where he modified the test in *Banks v Goodfellow*. This is what 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 [the two psychiatrists who gave evidence in the case, one of whom] 'described the symptomatic effect of bereavement as capable of being almost identical to that associated with severe depression'. Accordingly, 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." [95]*
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> *"Mr Key was devastated by his bereavement. It was in my judgment a severe affective disorder, perhaps sufficient on its own to have deprived him of testamentary capacity, but probably sufficient in combination with his mild pre-existing cognitive impairment." [107]*

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One of the psychiatrists who gave evidence in that case was Professor Jacoby, one of the world's leading experts in old-age psychiatry who has given expert evidence in many cases involving testamentary capacity.

> Professor Jacoby *"said in cross-examination that distress caused by bereavement may make the sufferer suggestible and may make him say anything to put an end to emotional pressure. He said that a severe reaction to bereavement may, like depression [be] caused by other factors, impair attention and concentration, and the ability of the sufferer to take things in and remember them. He said that depression could itself cause cognitive impairment with symptoms similar to dementia, a condition [from which] unlike true dementia, the patient might recover once the factors causing the depression had passed." [109]*

In ruling that Key lacked sufficient mental capacity when he made his will, the judge said that "to the extent that such a conclusion involves a slight development of the *Banks v Goodfellow* test... I consider that it is necessitated by the greater understanding of the mind now available from modern psychiatric medicine, in particular in relation to affective disorder." *[115]*

My reason for referring to the *Key* case is a desire to publicise the very sensible decision of Mr Justice Briggs in which the test in *Banks v Goodfellow* was expanded to incorporate some medical developments that have occurred since 1870. I suspect the court's assessment of Mrs D's capacity in the *Dodssuweit* case might have been assisted if the psychiatrists had not been confined to the test set out in *Banks v Goodfellow* and it had been able to assess capacity for decision-making by reference to some other medical discoveries that have occurred in the past 150 years.

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