Private Client eBriefing

Testamentary capacity: warning signs and professional best practice

Article by Simon Atkinson, 30th September 2024

The recent decision of Joanna Smith J in *Leonard v Leonard* [2024] EWHC 321 (Ch) is instructive for private client practitioners, non-contentious and contentious alike. The validity of a will was disputed on the grounds of lack of testamentary capacity and want of knowledge and approval. The case stands out for its unusual facts, of how warning signs were missed, of how a professional will drafter failed to comply with repeated client instructions for a simple will, and of how the court will be aided (or not) by *ex post facto* expert evidence.

Facts

The testator, Dr Jack Leonard, executed a will at home in October 2015 without any professional supervision. Jack was in his early 80s at the time. The children of Jack's first marriage invited the court to pronounce against the validity of this will and to admit to probate an earlier will made in 2007, which it was common ground was valid. The later will bequeathed a substantial portion of Jack's estate to his second wife and his step-children and step-grandchildren. The later will was held by Joanna Smith J to be invalid.

A very detailed picture of the testator emerged from the evidence. Jack had been a successful and wealthy businessman. He retired in the mid-1990s, shortly after which his first wife died. He remarried in the late-1990s. Jack had been very generous to his children over the years, including gifting a house in Brighton to one of his daughters in the mid-1990s and paying for the long-term medical treatment in the US for one his children. In 2013 he settled some money into trust for his second wife and in 2014 gifted some money to one of his step-grandchildren. Although the validity of these 2013 and 2014 gifts had initially been in issue in the proceedings, by the time of trial this was no longer challenged by reason of the expert evidence.

Jack was obviously a very astute person both in business and his personal affairs. In 2012 and 2013 he had engaged with tax advisors about possible new French, English and US wills in which jurisdictions he had substantial assets. As the Judge observed, there was clear evidence of Jack having a good level of cognitive function at this point in time: [187].

From around mid-2013, however, there were early signs of cognitive decline, including a change of behaviour which had been noted at a family wedding in the summer of 2013.

It was in October 2013 that Jack and his second wife instructed a will drafter, a chartered tax advisor, to prepare their wills. Jack had indicated that he wanted a simple will that left everything to his wife, trusting (as the Judge found) that his wife would carry out his stated wish that four-fifths of his estate should go to his children: [217].

The will took two years to finalise and went through repeated drafts. Over this time, there were numerous changes to Jack's instructions and, as the Judge found, some of these were inconsistent with each other or contained factual inaccuracies. Contrary to the clear instructions to prepare a simple will, the will drafter had in fact prepared complicated documents, and as was apparent from some of the correspondence from the testator, he had not understood some of these complicated provisions.

The evidential exercise of determining capacity and knowledge and approval was complicated somewhat by the lack of detailed recollections of the parties who witnessed the signing of the will in October 2015 and by the fact that Jack's wife had, by the time of proceedings, herself lost capacity so was unable to give evidence. The Judge held that she was *"unable to attach any weight"* to the will drafter's evidence that she, the will drafter, was *"totally satisfied"* that Jack had testamentary capacity. The will drafter had not thought to consult her supervisor, to see Jack alone or to apply the Golden Rule, even when it was clear that Jack was struggling to understand the provisions of the draft will: [428]. Importantly, the will drafter had only met Jack in person twice during the period in question and she had not met or spoken to him (except via email) for almost a year prior to the execution of the will. The mistakes which the will drafter made in the drafting of the wills were found to have had a negative impact on his will-making ability and his overall understanding: [429].

So far as the medical evidence was concerned, there was a large degree of agreement between the experts. Neither had examined Jack in his lifetime and neither was able to say with certainty whether Jack had testamentary capacity at the relevant time. They agreed that Jack was suffering from dementia, probably mixed Alzheimer's and vascular dementia, at the time of the making of the disputed will. They also agreed on certain medical matters concerning the impact dementia can have on executive function and on the interpretation of a detailed neuropsychological assessment which had been carried out on Jack in August 2015, some two months before the disputed will was executed.

The Judge noted that she was *"initially concerned that the court could derive little, if any, assistance from such an exercise and that concern was not much dispelled when I heard the experts give their oral evidence"*. She emphasised that only very limited assistance could be gained from the experts' respective views of individual documents, particularly when those views were given without any clear understanding of the totality of the evidence. The Judge stressed that ultimately it was for the court, not an expert witness, to determine what, if any, inferences should be drawn from the documentary and other evidence when seen in context: [135] – [141].

Having considered all of the evidence the Judge concluded that Jack did not have testamentary capacity in October 2015: [447] – [479]. The Judge also concluded that Jack did not know or approve of the will: [481] – [483]. Given the errors in the will itself, the provisions in any event did not reflect the choices Jack had made or his testamentary intentions in relation to one of his children, so he could not have known or approved of its contents: [483].

Analysis and lessons

The case is important for practitioners in several respects. First, the Judge undertook a detailed consideration of the test in *Banks v Goodfellow* (1869-70) LR 5 QB 549. The Judge confirmed that it contains four separate elements (notwithstanding a recent paraphrasing of the test by the Court of Appeal in *Hughes v Pritchard* [2022] Ch 339 which had only identified three separate limbs).

The four limbs are as of course as follows (per Cockburn CJ in *Banks*):

> *"It is essential… that a testator (i) shall understand the nature of the act and its effects, (ii) shall understand the extent of the property of which he is disposing; (iii) shall be able to comprehend and appreciate the claims to which he ought to give effect; (iv) and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made."*

Joanna Smith J confirmed that the fourth limb is indeed separate from the third: [155].

The Judge also reiterated a number of important principles regarding testamentary capacity under English law. First, the law is not that a person suffering from reduced cognitive abilities owing to a mental illness does not have testamentary capacity. Secondly, the *Banks* test concerns the ability / capacity to understand; it does not require actual understanding or recollection; it does not require the testator to compile a mental inventory or valuation of all his assets; forgetting details about his assets, or the names of relatives or the terms of a past will does not necessarily equate to a lack of capacity;

and there is no requirement to understand the collateral consequences of a disposition as opposed to its immediate consequences: [152]. Relevant evidence as to capacity may derive from the circumstances at the time of the execution of the will itself, as well as events prior to and after the execution of the will. The Judge emphasised that the *Banks* test is obviously transaction and issue specific. The testator must have the mental capacity to understand the particular transaction and its nature and complexity. That encompasses the complexities in the will itself (limb 1), the complexities of the testator's property (limb 2) and the complexities of the moral claims on the testator's estate (limb 3): [152].

The Judge's exegesis on *Banks* is an important restatement and explanation of what the test does require (and just as importantly what it does not). On the particular facts of this case, the Judge concluded that limbs 1 and 4 were not satisfied, although limbs 2 and 3 were: [447] – [476].

The case is also critically important reading for will drafters. The will drafter in this case was subject to significant criticism. Basic procedures were not followed and obvious warning signs were not spotted. A few important steps, which seem obvious when stated but are so often overlooked in practice, were missing here and should always be at the forefront of will drafters' minds.

First, if in doubt a capacity assessment should be undertaken (though note of course that a failure to follow the Golden Rule is not determinative of whether a testator had capacity: see *Rina v Shun* [2024] HKCFI 1025). Secondly, hold an in person meeting shortly before execution of the will (or even better at the time of execution). Thirdly, make sure the terms of the will accord with a testator's instructions; if it does not, not only is this likely to be a professional failing in itself (unless there is a proper reason for diverging from the same, which will need to be explained to the testator) but it may well (as it did here) damage the testator's ability to understand the document and to give his knowledge and approval to the same.

As is often the case with probate disputes, had proper procedures been followed, it is very likely this case would never have reached trial. No will drafter wants to be the subject of this sort of High Court scrutiny. *Leonard v Leonard* provides a warning and lessons to all.

For more information:

- Our Trusts, probate and estates: contentious expertise.
- Our Trusts, probate and estates: non-contentious expertise.

If you are viewing this document on LinkedIn, you can download it by clicking on the  *icon in the top-right-hand corner when in full screen view.*