Satisfying *Banks v Goodfellow*

Simon v Byford *demonstrates that the courts will not set aside lightly a will because the testator has failing cognitive faculties. Harriet Atkinson and Zahra Kanani analyse the case*

Harriet Atkinson and Zahra Kanani are solicitors in the private client department at Forsters LLP

'The case highlights that for testamentary capacity to be present, the test in *Banks v Goodfellow* must be satisfied.'

There has been a sharp rise in the number of disputes concerning the validity of wills. Increasing property values means estates are getting bigger and, with an ageing population, there are greater numbers of people suffering from diseases such as Alzheimer's and dementia. It is often wills made later on in life that end up being challenged on the grounds that the testator lacked the requisite testamentary capacity to make the will.

In the recent case of *Simon v Byford* [2013], the 88-year old testatrix was found to have testamentary capacity when she changed her will, despite suffering mild to moderate dementia.

This article looks at the case and its implications in more detail.

Facts

Constance Simon died in 2009 at the age of 91. She was a widow with four children, one of whom, David, had pre-deceased her. The main assets she held at the date of her death were her house in Wellington Road, St John's Wood, London, valued at £1.75m, a flat in Westcliff-on-Sea valued at £262,500, savings and shares worth £55,000 and 16 shares in RW Simon Ltd (the company), a manufacturing company founded by her late husband in 1958. Mrs Simon made a will in 1978 by which she left her estate to her four children in equal shares. She made a further will in 1992, which left £20,000 to her longstanding housekeeper and assistant, Mary, but otherwise again left her estate to her four children in equal shares. By a further will made in 1994 she left her shares in the company and the Westcliff flat to her son Robert and divided the remainder equally between her four children. In a letter written in March 1993, which she left in her safe, Mrs Simon set out her reasons for favouring Robert in this way. The letter stated that she felt that Robert had been mainly responsible for the success of the company and had left him the shares to give him a measure of control. She also felt that he had looked after her and other family members. The provisions of the 1994 will were repeated in a subsequent will in 1996 that changed only the identity of her executors.

The disputed will was executed on 18 December 2005 and was made at Mrs Simon's 88th birthday party, which was attended by two of Mrs Simon's three surviving children but not her son Robert. In the will, the legacy of £20,000 to Mrs Simon's assistant was preserved, but her estate was divided equally between her three surviving children and the family trust of her late son David. It differed in substance from her earlier will therefore, by the removal of the bequest to Robert of the shares in the company and the flat in Westcliff. On the face of it, the difference centred around a relatively small part of Mrs Simon's estate, as the flat represented only 10% of the value of her estate and the shares in the company were a small holding. The shares would, however, have given Robert over 25% of the shares in the company and a majority if aligned with one of his sibling's shares. At the time of making the will, it was agreed that Mrs Simon was suffering from mild to moderate dementia.

The claim

Robert challenged the 2005 will on the grounds that his mother lacked testamentary capacity and did not know or approve of the contents of it.

The court's findings of fact

There was no dispute that Mrs Simon had been suffering from mild to moderate dementia at the time the will was made. This, the judge found, was sufficient to put her testamentary capacity at the date of execution in doubt and to excite suspicion as to whether she knew of and approved the contents of the will. Notwithstanding this, considering her testamentary capacity, the judge Nicholas Strauss QC, found that:

- Mrs Simon knew her previous will would be revoked.
- Mrs Simon was capable of understanding, and did in fact understand the extent of her property. She knew that her most substantial asset was the house in Wellington Road, and that she had other assets including the Westcliff flat (and indeed it was reference to her Westcliff flat at her birthday party which triggered her wish to make a new will).
- She understood that her existing will did not favour her four children equally, but benefited Robert to a greater extent than the others.
- She wished to execute a will which benefited her four children (or, in the case of David, his family) equally.
- Reminded of Mary's long service, she wished to benefit her to the extent of £20,000.

The judge found that Mrs Simon was capable of understanding (and indeed did understand) the nature of making a will and the effect of the 2005 will, which was a very simple one. However, he found that there were some elements that Mrs Simon did not understand. Although she understood that David's share would go to his family trust, she was not capable of remembering any further details about the trust. She also knew she held some shares in the company, although she could not recall the exact number. Notwithstanding this, he found that this was not fatal to her satisfying the first and second limbs of the requirement for testamentary capacity set out in *Banks v Goodfellow* [1870].

The main question that arose was whether Mrs Simon satisfied the third limb of the *Banks v Goodfellow* test, namely whether she was able to comprehend and appreciate the claims that potential beneficiaries had on her estate in order to 'achieve a rational and just testament'. The judge asked whether, as in this case, a testatrix 'who is able to recollect the identity of the people who deserve to be remembered, but not the terms of, or the reasons for, a previous will, does or does not have testamentary capacity' [13]. He found that Mrs Simon had satisfied this requirement by understanding, inter alia, that her previous will would be revoked and that her existing will left her estate unequally between her four children by benefitting Robert to a greater extent. She had also stated that she wished to execute a will that changed this to an equal division. The judge commented that it was not necessary for Mrs Simon to remember all the detailed circumstances, which

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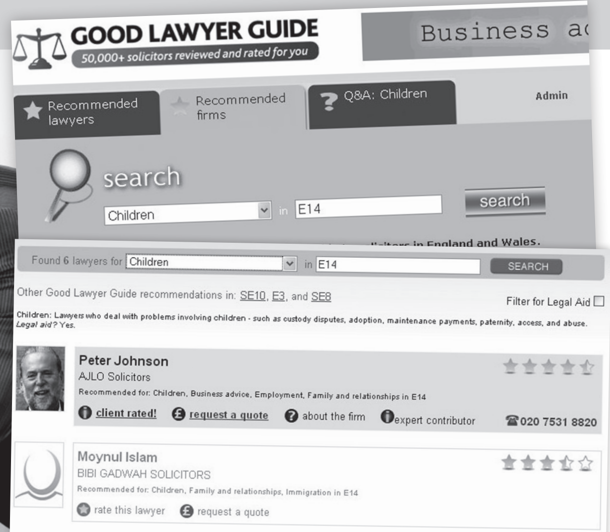

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were relevant as to how her estate should be divided.

As to the question of want of knowledge and approval, the judge found that Mrs Simon knew of and approved the provisions of the 2005 will. The evidence confirmed that she had been taken carefully and conscientiously through the terms of the will and had understood them. Further, Mrs Simon had asked that her son Robert and her assistant Mary were not told about the contents of the new will.

Testamentary capacity, as considered by the courts, does not necessarily accord to the layman's understanding of capacity.

The decision

The judge stated that:

> Nicholas Strauss QC dismissed Robert's claim and found that the 2005 will was valid, stating (para 14):
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> > ... to hold on the facts of this case that Mrs Simon did not have testamentary capacity would require too much, and would be inconsistent with the authorities which support the right of elderly people to make a will disposing of their property as they see fit, even if their mental faculties are far from being at their peak.

Although Mrs Simon was suffering from dementia at the time she made her will, she was enjoying a 'good' day and was able to understand the effect of its terms. He confirmed that it was possible that a person might have testamentary capacity on one day but not on another, or even during part of one day but not during another part.

Analysis

The comments of Nicholas Strauss QC suggest that the courts will not set aside lightly a will on the grounds of lack of testamentary capacity. However, the case highlights that for testamentary capacity to be present, the test in *Banks v Goodfellow* must be satisfied. The level of understanding required to prove the testator had the requisite capacity will vary from case to case and will, of course, depend on the detailed facts of any given case. Factors relevant to the assessment of capacity will include the complexity of the estate, the nature of the assets and the number and identity of the beneficiaries. It is also clear that a testator may have capacity one day but not the next, but that suffering some loss of cognitive ability or decline in mental functions will not necessarily prevent a testator from having testamentary capacity.

In this case the will was a very simple one, which did not deviate significantly from her earlier wills, and the beneficiaries under both wills were obvious ones and nobody was omitted. Had the circumstances been different, or had the will differed substantially from Mrs Simon's previous wills, the outcome of the case might not have been the same.

Application of the 'golden rule' following *Simon*?

Although the disputed 2005 will was prepared and executed without Mrs Simon being medically examined, and without a solicitor being present, in circumstances where capacity is in doubt, the 'golden rule' is still of importance to legal practitioners.

The substance of the 'golden rule' (Briggs J in *Key v Key* [2010]):

> ... is that when a solicitor is instructed to prepare a will for an aged testator, or for one who has been seriously ill, he should arrange for a medical practitioner first to satisfy himself as to the capacity and understanding of the testator, and to make a contemporaneous record of his examination and findings.

It is entirely possible that had Mrs Simon visited a solicitor (and she was indeed pressed to visit one by her son Jonathan), he or she would have considered whether or not to apply the 'golden rule' in light of her age and her suffering from dementia.

It is recognised that elderly people, even those suffering from dementia, can display a good social 'front'. In *Key*, Briggs J noted that persons with failing mental faculties may genuinely be able to conceal 'what they regard as their embarrassing shortcomings' [8] so that friends and professional persons such as solicitors may fail to detect defects in mental capacity which would be apparent to a trained medical practitioner, who was familiar with the legal test for mental capacity. Compliance with the 'golden rule' does not always mean that a will challenged on the grounds of testamentary capacity would automatically be upheld. Rather, its purpose is to assist and minimise disputes post-death and at the heart of this is the need for practitioners to keep detailed and contemporaneous attendance notes to show that they have satisfied themselves that the requisite tests for satisfying testamentary capacity have been met. In the case of Mrs Simon, involving a medical practitioner at the time of execution could very well have prevented a dispute arising on her death.

Conclusion

The case is a reminder that testamentary capacity, as considered by the courts, does not necessarily accord to the layman's understanding of capacity. Each case is decided on its own particular facts, but at the core is the need for the testator to satisfy the limbs of the test laid down in *Banks v Goodfellow*. The judgment in this case certainly recognises that a testator may have capacity one day but not the next and that suffering some loss of cognitive ability or decline in mental faculties will not necessarily prevent a testator from having testamentary capacity.

The case is also significant in that it upholds the right of elderly people to leave their property as they choose and that the courts will not seek to set aside a will on the grounds of testamentary capacity without due reason. Where there is any risk that capacity may be an issue (for example, if the testator is suffering from dementia of any degree), practitioners are advised to engage a medical practitioner to verify the testator's capacity when preparing a will. ■

Banks v Goodfellow
(1870) LR5 QB549

Key v Key
[2010] WLTR 623

Simons v Byford & ors
[2013] All ER (D) 321 (May)
(to be reported in a future edition of Wills & Trusts Law Reports)