

TESTAMENTARY CAPACITY AND THE MENTAL CAPACITY ACT

1. The Mental Capacity Act 2005 (MCA) came into force on 1st October 2007. Its effect on the law and practice of wills is still being debated. The courts have yet to give firm and clear guidance as to the extent to which the MCA applies to the question of testamentary capacity, whether, and the extent to which if it does, the MCA makes any difference and how, if at all, the practice of the courts in determining testamentary capacity should change.
2. This, perhaps, is not surprising. Courts are notoriously disinclined to answer what may be quite difficult questions where, in the given case, the result may make no difference.

The Principles

3. Consideration of testamentary capacity almost inevitably starts with citation of a passage from the judgment of Cockburn CJ in *Banks v. Goodfellow* (1869-70) LR 5 QB 549 at 565. In the course of a long (for those days) judgment that surveys the essence of mental illness, Roman law, civil law and the law of the United States, the judge said this,

“It is essential to the exercise of such a power (to make a will) that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; 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 out a disposal of it which, if the mind had been sound, would not have been made.”

4. The full judgment of Cockburn CJ is worth reading, if for no other reason than to read the citation of the words of Chancellor Kent in *Van Alst v. Hunter* as follows,

“It is one of the painful consequences of extreme old age that it ceases to excite interest, and is apt to be left solitary and neglected. The control which the law gives to a man over the disposal of his property is one of the most efficient means which he has in protracted life to command the attentions due to his infirmities.”

5. Those words, spoken by a judge of the Court of Chancery of New York in 1821 show that people as much then as now feared neglect and loneliness in their old age. The manipulation by the elderly of possible inheritance is, of course, the stuff of many a Victorian melodrama. Today, perhaps, the concerns are more focussed on exploitation of the elderly, but still the important point is that the (human) right of an owner of property to dispose of it upon his death according to his will should not be lightly disturbed.
6. So far as the MCA is concerned, the relevant provisions are contained in sections 1 to 3. Technically speaking, they apply only “for the purposes of this Act”. This, therefore, begs the first question; to what extent do sections 1 to 3 MCA apply to questions of testamentary capacity?

Wills made before 1st October 2007

7. In *Simon v. Byford and Others* (2014) EWCA Civ. 280, Lewison LJ at paragraph 39 held that in relation to a will made before 1st October 2007, the relevant test was the *Banks v. Goodfellow* test saying, “*that is the applicable test in the present case, because the will was made before the Mental Capacity Act 2005 came into force*”.
8. It does not appear that the contrary was argued, nor could it realistically be said that the case would have been decided differently had the MCA been in force.
9. If, however, it is the case that the MCA has changed the law as to testamentary capacity, it will be very strange indeed if that was to any extent retrospective. You would have the position that a will made before 1st October 2007 might, on the *Banks v. Goodfellow* approach be invalid so that if the testator died before 1st October 2007 and the case came to court before that date, the court would have pronounced against the will, but if the same will came before the court after 1st October 2007, it might be found valid and the court might pronounce in its favour.
10. It may be inferred from what Lewison LJ said that had the will been made on or after 1st October 2007, then the MCA would have applied. That is one interpretation of what he said in that short sentence, but as the point was, plainly, not argued, little can be taken from that possible inference.
11. This question was discussed in *Fischer v. Diffley* (2013) EWHC 4567 (Ch) where the question of testamentary capacity in relation to a will made after 1st October 2007 came before the court. Only the parties who opposed the will were represented, those who sought to support it appeared in person. What the judge (His Honour Judge Dight, sitting as a Judge of the Chancery Division) said at paragraph 28 was,

“Notwithstanding the wording of subsection (1) it seems to me, having regard to the terms of the Act and the context in which it was enacted, that the principles go further and are applicable in situations such as the present and must be looked at alongside the classic test contained within the common law as set out in the case of Banks v. Goodfellow.”
12. A number of points can be taken from that sentence. The first is that the MCA principles supplement but do not supplant *Banks v. Goodfellow* and that the principles “go further”. The Judge, in his judgment, did not elaborate on the extent to which the principles of the MCA “go further”.
13. The issue of testamentary capacity in a post 1st October 2007 will came before the courts again in *Bateman v. Overy and Overy* (2014) EWHC 432 (Ch). The result of the case was a resounding failure for the claimant who sought, amongst other things, an order against a 2011 will. The case does not disclose any discussion as to whether or not the MCA has changed the court's approach to testamentary capacity. The Judge does not recite the test, but at paragraph 145 of his judgment, his conclusions clearly show he had the words of *Banks v. Goodfellow* in mind. The case is, perhaps, more important for the question of the approach to the burden of proof (of which more below). It is clear, however, that the Judge had little difficulty in finding in favour of the will.

14. There have been a number of differing pronouncements from judges as to whether the MCA applies to issues of testamentary capacity. In *A, B and C v. X and Z* (2012) EWHC 2400 (COP), Hedley J. was asked to make a declaration as to whether or not a person had testamentary capacity whilst that person was alive. The question was hypothetical and the court refused to answer it. The court referred to *Banks v. Goodfellow* and to the MCA.
15. In *Scammell v. Farmer* (2008) EWHC 1100 (Ch), Stephen Smith QC sitting as a Deputy High Court Judge ruled against the application of the MCA, firstly because the case was not within “the purposes of the Act” and secondly, because the relevant will had been made before the coming into force of the Act. There is, therefore, on this issue a degree of judicial inconsistency and ambiguity.
16. Will that inconsistency and ambiguity ever be resolved? It may well not be, because it may be that there will never be a case where resolution of that issue will make a difference to the result. Unless and until such a case arises, it is likely that the courts will continue, rather in the vein of His Honour Judge Dight to take into account both the words of Cockburn CJ in *Banks v. Goodfellow* and sections 1 to 3 of the MCA. Whether that is right from a purely jurisdictional point of view may well remain moot for some time.

Is there a difference between *Banks v. Goodfellow* and the MCA?

17. Without wishing to teach grandmothers to suck eggs, it should be borne in mind that we are not comparing like with like. What Cockburn CJ said in *Banks v. Goodfellow* was a judicial pronouncement which should not be subject to the same canons of interpretation as a statute.
18. In *Smith v. Byford* at paragraph 39, Lewison LJ emphasised that the *Banks v. Goodfellow* test only required the potential to understand and that it should not be equated with a test of memory so that the testator need not, at the moment he makes his will, actually have in mind everything that is at his disposal but, rather, simply that he must be able to have that in mind. Similarly, at paragraph 43, he held that although the testator must be capable of understanding what assets are at his disposal and the persons who have claims on those assets, he does not have to understand what the collateral consequences of disposing of them in one way rather than another might be. It had been argued that the testator should be able to understand what the consequences to beneficiaries of a particular disposition might be. This was rejected.
19. It is inherently unlikely that the MCA was intended to make more wills invalid. If anything, the reverse. It is possible by textual analysis to point to differences between the words of section 3 (in particular) and what Cockburn CJ said in *Banks v. Goodfellow*. It is possible to say that there is nothing in *Banks v. Goodfellow* that requires the testator to be able to retain information. There is, also, nothing in *Banks v. Goodfellow* to say that the information relevant to a decision should include information about the reasonably foreseeable consequences of deciding one way or another or failing to make the decision.

20. It is to be remembered, however, that every decision about capacity under the MCA is decision specific. Thus the testator, when making a will, must simply be able to retain relevant information for long enough to enable him to make the will. Though not expressed in the *Banks v. Goodfellow* test, it would be surprising if that test would lead to the court pronouncing in favour of a will made by a person who could not retain information for long enough to use it to make the decision whether or not to make the will or what to put in it.
21. Likewise as to the relevance of information, that, again, is decision specific. In my view, a court applying section 3 would come to the same decision as the court in *Smith v. Byford* in holding that, for the purposes of making a will, the testator does not have to understand the collateral consequences of his decisions and, therefore, information in relation to the collateral consequences of that decision is not “relevant”.

The Burden of Proof

22. Section 1(2) MCA states that a person must be assumed to have capacity unless it is established that he lacks capacity. It has long been held at common law that a testator is presumed sane at the time when he made his will.
23. The common law rules as to burden of proof in relation to testamentary capacity are set out in *Key v. Key* (2010) EWHC 408 (Ch) (2010) 1 WLR 2020 at paragraph 97 et. seq. They are that
 - (i) While the burden starts with the propounder of a will to establish capacity, where the will is duly executed and appears rational on its face, then the court will presume capacity.
 - (ii) In such a case, the evidential burden then shifts to the objector to raise a real doubt about capacity.
 - (iii) If a real doubt is raised, the evidential burden shifts back to the propounder to establish capacity nonetheless.
24. In *Bateman v. Overy and Overy*, at 135 to 138, the court considered a submission that the approach to burdens of proof had been altered by what the Court of Appeal said in *Hawes v. Burgess* (2010) EWCA Civ. 74 at paragraphs 13 to 14. There is no reference in the judgment to the effect of section 1(2) MCA.
25. In *Hawes v. Burgess*, Mummery LJ had emphasised the fact that the reality is that the court has to consider and evaluate the totality of the relevant evidence and that talk of presumptions and their rebuttal is not especially helpful these days.
26. In his decision in the *Bateman* case at 138, the Judge held that he should adopt the approach as set out in *Key v. Key* holding that the *Hawes* case dealt with general matters rather than the specific issue of testamentary capacity, but that he would step back at the end and test his conclusions against Mummery LJ’s more general remarks. In the result, the facts were such that there was little doubt but that the 2011 will was valid.

27. The fact is that courts do not like deciding matters on burdens of proof. That said, to the extent that the MCA applies at all and, if it applies in this respect it must, in my view, apply to all wills not just wills made after 1st October 2007, it points to the fact that, until proved otherwise, a person is assumed to have capacity. For a court to adopt a different approach simply because it is dealing with a question of testamentary capacity, flies in the face of the modern approach to capacity which is to refrain from holding a person to lack capacity unless it is established that it is so. As set out above, the ability of a person to make a will is an important (human) right.
28. If the MCA does anything in this field, therefore, what it should do is remind the courts that unless established otherwise, it is assumed that the testator had capacity when he made his will and that the important right of a person to dispose of their property as they wish on their death should not lightly be disturbed.

Simon Edwards
39 Essex Street
March 2014