Banks v Goodfellow sesquicentennial – Is there anything new under the sun?

Re SB; Ex parte AC [2020] QSC 139

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This year marks 150 years since *Banks v Goodfellow* [1870 LR 5 QB 549 (Eng.)] was determined.

In all this time, it has been the classic statement of law on the question of testamentary capacity. It seems almost trite to recite the ratio:

"It is essential to the exercise of such a power 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 about a disposal of it which if the mind had been sound, would not have been made."[1]

The genius in the statement is how the language endows the test with flexibility, enabling the courts to adapt to changes in society and the complexities of property ownership, over the course of one and a half centuries.[2] "[T]he question is one of common law principle, not of construction of the words used to frame one part of an elaborate judgment in 1870. Judgments should not be read as if they were statutes."[3]

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So far this year, *Banks v Goodfellow* has been cited and applied in no less than six determinations as to testamentary capacity in the Supreme Court of Queensland.[4] So, after 150 years and innumerable applications, it comes as no surprise that the test has had its fair share of challenges, most recently in the matter of *Re SB; Ex parte* AC [2020] QSC 139 (*Re SB*).

Re SB involved an application for a statutory will and a declaration as to the execution by a financial administrator of a non-lapsing binding death benefit nomination in a superannuation fund. SB suffered a severe spinal injury[5] in a motor vehicle accident, for which a compromise was reached for $10 million dollars plus costs.[6]

The extent of her physical injuries are significant. "She can move her head very slightly from side to side. She cannot move her trunk and limbs. She is dependent on a ventilator via a tracheostomy. She is fed via a gastric stoma. She is dependent on carers for activities of daily living. She is unable to speak but she can mouth words and make some noises. Non- family members are unable to communicate effectively with her. It appears that some family members, especially one of her sons, is able to communicate to a limited extent with her."[7]

In addition, SB had no formal education, speaks no English, had never held employment in Australia, and prior to receipt of her compensation had no significant assets.[8] However, "[t]here was no evidence of cognitive impairment, but objective assessment was extremely difficult due to the communication difficulties".[9]

In respect of the application for a statutory will, sections 21-23 *Succession Act 1981* (Qld) set out the elements which must be present for a court to make an order for a will, a fundamental criterion being that the proposed testator lacks testamentary capacity.[10] The court must also be satisfied that the proposed will was one which the proposed testator would, or might, make if s/he had testamentary capacity.

Here two elements created substantial challenges for the court.

Firstly, how could an assessment of testamentary capacity be undertaken in circumstances where the proposed testator was unable to effectively communicate?[11] His Honour critically observed that "[t]he language used in [*Banks*

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v Goodfellow] may not pass muster in light of advances in medical knowledge since then".[12]

In that context, is *Banks v Goodfellow* showing its age? It is framed in such a way as to assume the ability to communicate. On that aspect, Martin J agreed with submissions that "capacity to make a will requires not only the mental acuity necessary, but also the ability to convey the testamentary intentions".[13]

He accepted the assessing doctor's opinion that "[a] general requirement for capacity is that a person is able to understand the facts involved in the decision-making and the main choices, weigh up the consequences of those choices and understand how the consequences affect them and communicate their decision. Even with the assistance of her son, SB was unable to communicate to [the doctor] her reasoning behind her decisions."14

Accordingly, Martin J determined that the proposed testator did not have the requisite capacity to make a will.

Notably, Martin J also observed the *Banks v Goodfellow* test "was applied in circumstances where the instructions for a will and the formal will itself had been signed by the testator, thus 'the question [was] whether on both or either of those days the testator was of sound mind, so as to be capable of make a will.'15 It was an assessment, then, that was made of the capacity of someone who had already made a will, not about a person's capacity to make a will."16

On the question of the terms of the will, here the testator had never made a will and there was little to no evidence of her prior testamentary intentions and so the court's ability to assess whether the proposed will was one that the testator might have made was problematic. "There [was] no reliable evidence of SB's wishes. There is no previous will and no record of any expression by her at an earlier time about her wishes or intentions."17

Although there was "some indication for some provision to be made for her children".18

The court noted the applicant's evidence. The applicant was an experienced succession law solicitor who deposed "that the terms of the proposed will are

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consistent with what a married woman might be expected to do by way of provision for a long-term spouse and the provision of some benefit to the children of her marriage".19

Having regard to the evidence before it, the court determined to make the order for the proposed will.20

This decision raises some interesting questions for succession lawyers to consider. On the issue of limited evidence as to the proposed testator's testamentary wishes, to what extent must an applicant go to ascertain the testamentary wishes of the proposed testator? While the role of an applicant in a statutory will matter involves deposing to their understanding of the testamentary wishes of the proposed testator, it is unusual for an applicant to form an opinion from mere generalisations.

Are Martin J's observations a fissure in the universality of *Banks v Goodfellow*? With advances in medical science and science generally,21 should the applicable test for testamentary capacity differ according to whether the court is making an assessment on validity of an existing will, vis making a determination to grant an order to make a will?

If so, ought the definition of capacity be codified generally or confined to the statutory will provisions under Part 2, Division 4, Subdivision 3 of the *Succession Act 1981*? Could it be that the definition of capacity as propounded in the *Powers of Attorney Act 1998* (Qld)22 be adopted to also include a requirement that the person is "capable of communicating the decisions in some way".

Or is it the case that the "[l]aw [is] marching with medicine but in the rear and limping a little…"23 with there being nothing new under the sun?

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Notes

[1] *Banks v Goodfellow (1870) LR 5 QB 549, 565 per Cockburn CJ.*

[2] *To that end note the approach in Badram v Kerr [2004] NSWSC 735 [49] with respect to knowledge of the extent of property:*

"In dealing with the Banks v Goodfellow test it is, I think, necessary to bear in mind the differences between life in 1870 and life in 1995. The average expectation of life for reasonably affluent people in England in 1870 was probably less than 60 years and for others less well off under 50 years: the average life expectation of males in Australia in 1995 was 75 years. Younger people can be expected to have a more accurate understanding of the value of money than older people. Younger people are less likely to suffer memory loss. When there were fewer deaths at advanced age, problems which arise with age, such as dementia, were less common. In England in 1870, if you had property it was likely to be land or bonds or shares in railway companies or government backed enterprises. Investment in ordinary companies was far less common than now. Older people living today may well be aware that they own substantial shareholdings or substantial real estate, but yet may not have an accurate understanding of the value of those assets, nor for that matter, the addresses of the real estate or the particular shareholdings which they have. Many people have handed over management of share portfolios and even real estate investments to advisers. They may be quite comfortable with what they have; they may understand that they have assets which can provide an acceptable income for them, but at the same time they may not have a proper understanding of the value of the assets which provide the income. They may however be well able to distribute those assets by will. I think that this needs to be kept in mind in 2004 when the requirement of knowing 'the extent' of the estate is considered. This does not necessarily mean knowledge of each particular asset or knowledge of the value of that asset, or even a particular class of assets particularly when shares in private companies are part of the estate. What is required is the bringing of the principle to bear on existing circumstances in modern life."

[3] *Carr v Homersham (2018) 97 NSWLR 328 at [132] per Leeming JA.*

[4] *In the Will of Esme Jane Ferris (deceased) [2020] QSC 26 (19/931) Crow J 2 March 2020*
Re SB; Ex parte AC [2020] QSC 139 [2020] 24 QLR (BS No 4753 of 2020) Martin J 29 May 2020
Tolbert v Hicklin [2020] QSC 166 (BS 7852 of 2018) Brown J 10 June 2020
Trinder v Ciniglio [2020] QSC 176 [2020] 26 QLR (BS 6320 of 2018) Brown J 16 June 2020
Duncan v Gibson [2020] QSC 204 (BS 5172 of 2019) Boddice J 9 July 2020
Sebasio, Re [2020] QSC 247 (BS No 10388 of 2019) Callaghan J 12 August 2020.

[5] *At [7].*

[6] *At [8].*

[7] *At[7].*

[8] *At [12]-[13].*

[9] *At [24].*

[10] *Section 21(1)(a) Succession Act 1981 (Qld).*

[11] *See [26].*

[12] *At[21].*

[13] *At [22].*

[14] *At [26].*

[15] *Citing Banks v Goodfellow at 551.*

[16] *At [20].*

[17] *At [29].*

[18] *At[29].*

[19] *At [30].*

[20] *At [32].*

[21] *scientificamerican.com/article/wireless-brain-implant-allows-ldquo-locked-in-rdquo-woman-to-communicate/ – a woman with locked-in syndrome receives a brain implant that enables her to communicate.*

[22] *POA Sched 3 – Dictionary*
'capacity' , for a person for a matter, means the person is capable of—
(a) understanding the nature and effect of decisions about the matter; and
(b) freely and voluntarily making decisions about the matter; and
(c) communicating the decisions in some way.

[23] *Mount Isa Mines Ltd v Pusey [1970] HCA 60; (1970) 125 CLR 383, 395.*

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