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James v James [2018] EWHC 43 (Ch) – lessons to learn…..

With people living longer, often with deteriorating mental capabilities, it is perhaps unsurprising that more and more questions are being raised about a person's capacity to make a decision that undoubtedly has huge ramifications for their family members. A solicitor tasked with preparing a Will has the very important task of drafting a Will that meets the testator's requirements at the same time as ensuring that they only act for a testator who has testamentary capacity. Over the years, various Wills have been tested in Court where criticism has been levelled at the solicitor who prepared the Will for failing to properly assess and document the testator's testamentary capacity.

The recent case of ***James v James [2018] EWHC 43 (Ch)*** is one such case. Charles James built up a large farming and haulage business in Dorset. In 2007, he gave some land to his daughter, Karen. In 2009, he transferred some land and his business to his son, Sam. He then made a Will in 2010 leaving his remaining land and the residue of his estate to his daughters, Karen and Serena, and his wife, Sandra. Sam was not a beneficiary. After Mr James passed away, Sam brought several claims against his father's estate including a claim that he lacked testamentary capacity to execute a valid Will in 2010. The focus of this article is the testamentary capacity claim and the comments that the judge made about the preparation of the Will. It does not address the other claims. The claim proceeded to trial and evidence was obtained from various lay witnesses who knew Mr James, the solicitor who prepared the Will, other professionals who had dealings with Mr James and two expert witnesses being specialist, old age psychiatrists.

The first decision that the judge had to make before deciding this claim was what the applicable test for testamentary capacity actually is. Practitioners will be well used to the test laid down in ***Banks v Goodfellow (1870) LR 5 QB*** which is as follows:-

"It is essential…that a testator shall understand the nature of his 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, avert 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 which, if his mind had been sound, would not have been made."

The waters have been muddied by the introduction of the Mental Capacity Act 2005 ("MCA") which sets out a new test of capacity that is different to the principles of ***Banks v Goodfellow***. The MCA specifically sets out the test that the Court of Protection must apply when it is considering whether a living testator does not have testamentary capacity so that a statutory Will can be made for him instead. The question is whether that is the test to also be applied by judges assessing testamentary capacity retrospectively once the testator has died and the Will that the testator himself has prepared is the subject of challenge.

In the section of his judgment entitled "Law", the judge referred to various cases where different judges have grappled with the question of what the appropriate test now is. After considering the comments made by these various other judges and analysing the wording of the MCA itself, the judge decided that it is still the test set out in ***Banks v Goodfellow*** that has to be applied when assessing whether a testator who has now died had testamentary capacity when he executed his Will. Comments were made, both by the judge in James and in other cases that the wording of the MCA was very specific and that if Parliament had wanted the MCA test to trump ***Banks v Goodfellow***, it would have made this abundantly clear. In summary, the current position appears to be that all solicitors must consider the provisions of the Mental Capacity Act when they take instructions of whatever nature from a client. When taking Will instructions, private client solicitors should also carefully consider the various limbs of ***Banks v Goodfellow*** and satisfy themselves that the testator before them satisfies that test.

As is often the case when a claim is advanced that the testator lacked testamentary capacity, both the claimant and defendants instructed experts in old age psychiatry. Of course, neither of these experts met Mr James whilst he was alive and so their opinions were based on his medical records and witness statements. The experts agreed that he suffered from Alzheimers resulting in moderate dementia. They agreed that he met some of the ***Banks v Goodfellow*** requirements but differed in their opinion as to whether he had the capacity to appreciate the claims of his children on his estate. Whilst helpful therefore, it was clear that the determination was by no means clear cut.

The evidence of the solicitor who took instructions and prepared the Will was perhaps even more crucial in this instance where the expert conclusions were not dissimilar. Her file, witness statements and oral evidence were closely examined by both the barrister for the claimant and the judge. Whilst the challenge that was made to the validity of the Will was that Mr James lacked testamentary capacity, the judge noted that five conversations concerning the content of the Will were held with the testator's wife as opposed to the testator directly. Whilst conversations between family members about the content of a Will are not unusual, solicitors should take great care to check that the information being provided and instructions being given emanates from the testator himself.

The family broadly accepted that from 2004 onwards, Mr James' capabilities declined. There were several instances of confusion and memory loss recorded in their statements and the medical records had mentions of dementia and Alzheimers, although there did not appear to be any formal diagnosis. It was extremely unfortunate that the solicitor's attendance notes and letter of engagement failed to record any consideration of the requirements of ***Banks v Goodfellow*** with the conclusion that Mr James met that test. It was also extremely unfortunate that the solicitor did not take any steps to comply with the so called "Golden Rule". That rule of practice is that in the case of an elderly testator or one who has suffered a serious illness, a medical practitioner should either approve or witness the Will having satisfied himself of the capacity and understanding of the testator. No steps were taken by the solicitor at all to obtain any medical evidence to support the Will. The feeling is that it is much less likely that there will be a lengthy dispute on capacity post death if medical evidence was obtained at the time the Will came into being. In ***James***, the judge stated that it was "*obviously regrettable that a medical opinion was not obtained*".

Ultimately, in ***James***, the judge upheld the validity of the Will. Once again, the evidence of the solicitor who was actually involved in the drafting of the Will was crucial and perhaps even pivotal. The judge stated that he was "*particularly struck by the evidence of Ms Thomas (which I accept)*". She was an experienced private client solicitor well used to acting for farming families. Her oral evidence at trial was that Mr James showed no signs of confusion or ill health. She acknowledged that some of his behaviour was out of the ordinary but that she felt that he had the requisite capacity to execute a valid Will in 2010 and that there was no need for a medical opinion to be obtained to support that view.

A private client solicitor's role is to continually assess a testator's capacity. They are entitled to form the view that the testator has capacity and that no further, supporting evidence is required but their reasoning behind that decision will be tested in Court if a claim is advanced. A solicitor who has the comfort of a full file complete with detailed attendance notes of the meetings, file notes referencing a consideration of all of the limbs of ***Banks v Goodfellow*** and a supporting medical opinion is likely to feel much more confident in their assessment being upheld when giving their evidence than a solicitor who does not have the benefit of such a full file.

Our Contentious Trusts and Probate Team at Meridian Private Client LLP are experienced at dealing with all manner of disputes relating to someone's capacity. Our contact details are set out below:

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