Absence of evidence, lack of capacity

COMMENTARY BY SIMON ATKINSON, 16TH JUNE 2022

The Supreme Court of New South Wales has recently handed down judgment in *Lim v Lim* [2022] NSWSC 454.[1] This case is of note to will drafters in common law jurisdictions as well as those looking to challenge (or uphold) the substantive validity of testamentary documents. In *Lim* the Court revoked an apparently rational, properly attested will in simple terms on the grounds of lack of capacity and want of knowledge and approval. While the evidence before the Court was in very many respects *"manifestly deficient"*, the Court ultimately was unable to dispel the suspicion which had arisen that the testatrix did not have capacity and that the will did not reflect her real intentions. The case serves as a cautionary tale for will drafters and litigators alike.

The testatrix died on 16 November 2019, aged nearly 90. She had five children, from one of whom she was estranged. She left behind her a will dated 16 October 2019. She had previously made a number of wills, the most recent of which prior to 2019 was a will dated 29 July 2011. A grant in common form of the 2019 will had been made in September 2020, naming the defendant (one of the children of the testatrix) as executor, with power reserved. The plaintiff, another of the testatrix's sons, challenged the validity of the 2019 will and sought to propound the 2011 will, under which he took a greater share of the residue.

Each of the two wills was in simple form, obviously testamentary in character, clear and attested and duly executed. The 2019 will was just over two pages in length and appointed as executors each of the four of the testatrix's five children from whom she was not estranged. The 2019 will relevantly provided that the residue of the testatrix's

[1] 14 April 2022 (http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2022/454.html?context=1;query=trusts;mask_path=au/cases/nsw/NSWSC)

estate was to be divided *"equally between such of [four of her five children] who survive me and attain the age of 18 years".* The testatrix's children were all over the age of majority at the time the 2019 will was executed.

The 2019 will contained an attestation clause which noted that a translator had attended, as the testatrix was *"able to understand the Mandarin Chinese language but [had] an imperfect knowledge of the English language".* The attestation clause further noted that the translator had read the 2019 will to the testatrix in the Mandarin Chinese language in the presence of the solicitor who had drafted the will, a Mr Lee, and that the testatrix had confirmed her understanding and approval.

There was evidence adduced at trial that the testatrix had not been wearing her hearing aids on the day of the meeting. There was also evidence that, following the execution of the 2019 will, the three children who had accompanied the testatrix to the solicitors' offices had been called into the meeting room where the will had been executed and the testatrix had asked if each of them was happy with the will and that they confirmed that they were.

As for the 2011 will, this relevantly provided that the plaintiff was to be sole executor and trustee. The residue was to be divided amongst the four of five children in the following proportions: 62% to the plaintiff, 30% to another, 3% to another and 5% to the defendant. The testatrix stated in the 2011 will that the reason for the unequal distribution was that the plaintiff had been *"living with me and looking after me for many years in my own home and [had] stated [his] commitment to continue to do so during my old age".*

There was an attestation clause in the 2011 will which again noted that a translator had read the will to her, although this time the attestation clause noted that the testatrix was not able *"to read or speak the English language. Hainanese dialect being the customary Chinese language understood by her".* Given the differences in the two attestation clauses, the extent of the testatrix's understanding of Mandarin was a material issue in dispute.

The Court's inquisitorial role in probate proceedings was rendered extremely difficult in light of the paucity of evidence. Having made the preliminary observation of a judge evidently all too familiar with probate litigation – that such disputes *"often become a proxy for disagreements between the parties about quite different matters occurring*

during the lifetime of the deceased" – Hallen J noted that this was not such a case, and indeed *"there was scant information about the deceased and members of her family"* and other important matters: [10]. The Court was unable *"to paint any clear picture of the deceased's personality or abilities"*: [11]. Two of the children of the deceased had not given evidence: Rose (who was the estranged child and had had no involvement in or connection with the preparation of the wills) and Ping (who had been a *"key participant"* in the making of the 2019 will but whom neither side had called to give evidence): [98], [106] – [107]).

So far as the evidence of the professionals was concerned, while Mr Lee, the solicitor, and Ms Li, the translator, had been called, their evidence was sparse. Mr Lee's affidavit spanned a mere 4 pages and his attendance note was *"hardly extensive"*: [267]. The Judge drily observed that one might have expected the evidence of the solicitor to be *"more expansive about the topics and content of the initial discussions"* [265]. Mr Lee did not obtain a medical assessment of capacity, was unaware of the principles set out in *Banks v Goodfellow* and was unaware of the professional guidance (similar to that which is given in England) given to solicitors when seeking instructions from an elderly or infirm client as to satisfying themselves that their client has capacity: [404] – [405]. The interpreter meanwhile had made an affidavit comprising 6 paragraphs, spanning 3 pages. She gave no evidence about her training in interpreting the contents of a will or her understanding of such concepts. She stated that she was unable to recall events of the day or of any interactions with the deceased despite having spent roughly three hours at the conference on 16 October 2019: [311].

As for medical evidence, there was precious little contemporary evidence as to the testatrix's capacity. The testatrix had been in and out of hospital for treatment arising as a result of her failing liver. The attendant physician who had treated the testatrix at around this time admitted that he was not a liver specialist. While he had prepared a letter stating that the testatrix had *"presented as being fully alert, with a good memory and intact cognition and preserved ability to express her thoughts clearly"* and that there was no need formally to assess her cognition, he confirmed that he had no clear memory of the deceased: [223]. He also only spoke English: [226]. Expert evidence subsequently obtained indicated that there was at least some *"doubt"* as to the testatrix's cognition by the middle of October 2019 (due, essentially, to the

presence of toxins in the brain that could no longer be cleared by the malfunctioning liver): [240].

It is apparent from the judgment that the Court found this a difficult case to resolve because of the very material gaps in the evidence before it. The Court ultimately found a want of capacity. Having concluded that the plaintiff had discharged the evidentiary onus of raising a doubt as to the existence of capacity, notwithstanding that the will was regular on its face and apparently rational, the burden was then on the defendant, as the propounder of the 2019 will, to satisfy the Court that the testatrix had capacity and the requisite knowledge and approval: [429]. That was not discharged.

So far as capacity was concerned, the Court, citing, *inter alia, Simon v Byford* [2014] EWCA Civ 280, stressed that the *Banks v Goodfellow* test is not a memory test nor even about the exercise of judgment; it is about capacity: [344] – [346]. The Court observed at [345]:

"This is a matter that is often forgotten by parties in probate cases. Importantly, what is being spoken of is capacity rather than the exercise of it. The question is whether the deceased had the capacity of sound judgment, not whether he, or she, in fact, made the judgment about his, or her, disposition of the estate by will soundly, and for reasons which might appear to the observer to be appropriate…"

While Hallen J said, at [390], that he was *"just satisfied"* that on the basis of the discussions between the solicitor and the testatrix she had the capacity to understand the nature of the act of making a will and further, at [392], that he was satisfied that the conversations demonstrated that she was aware of at least the persons who could be thought to have a claim upon her testamentary bounty, there was *"virtually no objective evidence"* which demonstrated that the testatrix was able to sift and weigh that information [434]. The solicitor had failed to ask any questions about her prior wills or why she was seeking to depart from the terms of the 2011 will: [393] – [397]. Given the lack of evidence it was *"difficult to conclude that the deceased had the capacity to give, any, or any real, considerations to the competing claims upon her bounty"*: [393]. The statement apparently made by the testatrix that it was for the children to sort out any issues suggested that the testatrix may not have had the

capacity to evaluate and to discriminate between the respective strengths of their competing claims: [399].

The Judge also stressed that the fact that a will is apparently rational or simple does not logically bear on the question of whether the testatrix had capacity to comprehend, appreciate, or evaluate matters relating to testamentary acts: [437] – [439]. What appears to have weighed heavily in the Court's mind are three factors in particular: first, the changes in the provisions regarding the residue of the estate between the 2011 will and the 2019 will which were unexplained ([442]); secondly, the fact that the 2019 will ignored statements apparently made by the testatrix to the plaintiff during her lifetime about what was to happen on her death ([443]); and thirdly, there was an unanswered question as to whether the testatrix could understand testamentary concepts interpreted in the Mandarin Chinese language ([452]).

So far as knowledge and approval was concerned, for the same reasons the Court held that the 2019 will did not reflect the real intentions and the true will of the testatrix: [458]. The presence of the condition requiring the residuary beneficiaries to be 18 or over also made little sense when all of the children were of majority by 2019: [460].

The lessons for English practitioners and clients arising from this case are clear. First of all, it bears repeating that anyone instructed to prepare a will should take careful and comprehensive attendance notes and needs to be alive to the legal principles and regulatory guidance applicable where there is any question of capacity. Ensuring these steps are taken not only mitigates the risk of subsequent challenge to the substantive validity of a will but also ensures that, should the will drafter subsequently be called to give evidence, he or she will be able to do so with the benefit of proper contemporaneous documentation and evidence as to capacity and knowledge and approval. Secondly, when preparing to challenge or defend the validity of a will, it is imperative that litigators and their clients keep in mind the evidence that will be needed at trial to establish their case. Many probate disputes of course contain a wealth of irrelevant or prejudicial documentary and witness evidence as family members seek to right various historic wrongs, whether real or imagined, that have little if any bearing upon the issues which the Court has to resolve. *Lim v Lim* had the opposite problem; a dearth of evidence generally which left a void (or at least a dark penumbra) in the canvass where the character and capabilities of the testatrix might have been sketched by the parties and the Court. Too much evidence can of course

be a problem both substantively and forensically in litigation; but so can too little evidence. A note of evidence can be an invaluable tool for the legal team to prepare while the litigation process is ongoing so as to ensure that, come the trial, all relevant material is before the Court for ruling upon the validity of a will.

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