A Capacity for Change? A Restatement of the Law of Testamentary Capacity in Loosley v Powell

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I INTRODUCTION

Allison Slater executed a new will just six days before she died (the Final Will). It represented a significant departure from a will she had executed some three years earlier (the 2011 Will), disentitling three of her five nieces and nephews from inheriting her residuary estate. Her family and friends were divided on whether she had sufficient capacity to execute a will.

The litigation that ensued allowed the courts to clarify and consolidate the law of testamentary disposition and its application. This article reviews the Court of Appeal's decision in *Loosley v Powell*.[1] It argues that *Loosley v Powell* does not represent a departure from established principles set out in the well-known English decision of *Banks v Goodfellow*.[2] Rather, *Loosley v Powell* provides an orthodox and coherent illustration of how courts and practitioners can apply the principles to navigate through often complex bodies of evidence. The decision is also notable for the indication that a review of the rule in *Parker v Felgate* may be forthcoming.[3]

II THE UNDERLYING DISPUTE

Allison died on 8 May 2014 at the age of 64, a widow and childless.[4] That being so, around the time she was diagnosed with breast cancer she prepared the 2011 Will, which left her residuary estate worth approximately $2,000,000 to be divided equally between all four of her sisters' children and the child of her sister-in-law. These residuary beneficiaries were Thomas and Nicholas, the children of Allison's older sister Jennifer Loosley; Katherine and Benjamin, the children of Allison's younger sister Barbara Powell; and Mark, the son of Allison's sister-in-law Jill Eleveld

Allison had married an Englishman, Paul Slater, and spent most of her life living in the United Kingdom. She nevertheless maintained a close relationship with the Loosley and Powell families, regularly visiting New Zealand. This arrangement continued after Paul's death, and indeed during

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1 *Loosley v Powell* [2018] NZCA 3, [2018] 2 NZLR 618.

2 *Banks v Goodfellow* (1870) LR 5 QB 549 (QB) as cited in *Loosley v Powell*, above n 1, at [3].

3 *Loosley v Powell*, above n 1, at [25]; and *Parker v Felgate* (1883) 8 PD 171 (Prob) as cited in *Loosley v Powell*, above n 1, at [3].

4 *Loosley v Powell*, above n 1, at [5]–[16].

most of the time after Allison was diagnosed with cancer. It was only through 2013, as Allison's health deteriorated and it became apparent she would not survive the cancer, that she chose to spend her last months in New Zealand. She had time for one last family holiday: in Rarotonga through mid-April 2014.

Upon her return on 23 April 2014, Allison went to live with the Loosley family, being too ill to live alone. In what is perhaps typical of testamentary capacity cases, several important events unfolded in the final weeks of her life. On Monday 28 April 2014, Allison arranged for Mr McDell, an experienced solicitor who had prepared the 2011 Will, to visit her the next day. In the preceding days, she had prepared some diary notes which were to form the basis of a new will. On Tuesday 29 April 2014, Allison instructed Mr McDell to appoint Mr and Mrs Loosley as the executors of her estate and remove the Powell children and Mark Eleveld as residuary beneficiaries. The next day, Allison sent Mr McDell an email clarifying her instructions, and also met with her mother, Mrs Farn. A further day passed and on 1 May 2014 Allison was admitted to a hospice in Glendowie for palliative care. On 2 May 2014, Mr McDell visited Allison and she executed her Final Will, which he had drafted. Bequests of $50,000 were left to Katherine and Benjamin and, although the Final Will made no provisions for Mark, $100,000 was left to his mother.[5] The residue of the estate was to be divided equally between Thomas and Nicholas. The Final Will made no provisions for chattels. Six days later, on 8 May 2014, Allison died.

After Allison's death, the Loosleys did not disclose the terms of the Final Will either to Mrs Farn or the Powells until probate had been granted. Their inquiries were rebuffed. Upon discovering the terms in June 2014, Mrs Farn and the Powells issued proceedings against the Loosleys as executors.

In the High Court, Courtney J found Allison lacked testamentary capacity when she signed the Final Will, and ordered recall of probate.[6] The crux of the Loosley's case on appeal was that Courtney J had erroneously modified the longstanding *Banks v Goodfellow* principles of testamentary capacity. They argued that, on a proper application, Allison had sufficient testamentary capacity on 2 May 2014 when she executed the Final Will. In the alternative, they argued in accordance with the rule in *Parker v Felgate* that Allison had testamentary capacity on 29 April 2014 when she instructed her lawyer as to the Final Will, as well as sufficient knowledge and understanding on 2 May 2014.

Delivering the unanimous judgment of the Court of Appeal, Asher J concluded the appellants had failed to prove testamentary capacity either when Allison executed the Final Will on 2 May 2014, or on 29 April 2014 when she instructed her lawyer on the Final Will.

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5 The Final Will also made bequests of $50,000 to Jennifer Loosley and $75,000 to Barbara Powell.

6 *Farn v Loosley* [2017] NZHC 317, [2017] 3 NZLR 383 at [127]. The other issues before Courtney J concerned undue influence and the Court's power to declare a will valid under s 14 of the Wills Act 2007. These issues were not ultimately pursued in the Court of Appeal.

III TESTAMENTARY CAPACITY

The principles that guide the court's assessment of testamentary capacity are well-settled and, it is suggested, were not substantively uprooted by the decision in *Loosley v Powell*. Accordingly, it is logical to start by restating those principles, as the Court of Appeal did.

The *Banks v Goodfellow* Principles

These "guiding propositions"[7] were laid down in the celebrated judgment of Cockburn CJ in *Banks v Goodfellow* and helpfully summarised in *Woodward v Smith*:[8]

> (1) Because it involves moral responsibility, the possession of the intellectual and moral faculties common to our nature is essential to the validity of a will.
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> (2) It is essential to the exercise of such a power that a testator:
>
> (i) understands the nature of the act and its effects; and also the extent of the property of which he is disposing;
>
> (ii) is able to comprehend and appreciate the claims to which he ought to give effect;
>
> (iii) be free of any disorder of the mind which would 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.
>
> …
>
> (5) In deciding upon the capacity of the testator to make his will, it is the soundness of the mind, and not the particular state of the bodily health, that is to be attended to. The latter may be in a state of extreme weakness, feebleness or debility and yet he may have enough understanding to direct how his property shall be disposed of; his capacity may be perfect to dispose of his property by will, and yet very inadequate to the management of other business, as, for instance, to make contracts for the purchase or sale of property.
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> (6) A testator who has reflected over the years on how his property should be disposed of by will is likely to find it less difficult to express his testamentary intentions than to understand some new business.
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> (7) Testamentary capacity does not require a sound and disposing mind and memory in the highest degree; otherwise, very few could make testaments at all.

7 *Loosley v Powell*, above n 1, at [19].

8 *Woodward v Smith* [2009] NZCA 215 at [19] as cited in *Loosley v Powell*, above n 1, at [3]. See *Banks v Goodfellow*, above n 2, at 565–568.

> (8) Nor must the testator possess such capacity to the same extent as previously. His mind may have been in some degree weakened, his memory may have become in some degree enfeebled; and yet there may be enough left clearly to understand and make a sound assessment of all those things, and all those circumstances, which enter into the nature of a rational, fair, and just testament.
>
> (9) But if that standard is not met, he will lack capacity.

This list reflects the complexity and evidential focus of the assessment of testamentary capacity. Nevertheless, some generalities are possible. The overarching inquiry will be into the "soundness" of the testator's mind at the relevant time: it must be sufficiently sound for the testator to assess the matters listed at (2), and other matters for a rational, fair and just testament. Resolving this inquiry will require substantial recourse to the evidence and it is in that respect that the Court of Appeal's decision is most instructive.

The Onus and Standard of Proof

First, however, matters of proof should be discussed, as there are some quirks to the way evidence is dealt with in testamentary capacity proceedings. Regarding the onus of proof in probate proceedings, those advancing the will's legitimacy — typically the executors — do not have to establish that the will-maker had testamentary capacity. In the absence of evidence raising lack of capacity as a "tenable issue", the will-maker will be presumed to have capacity.[9] It is only where there is evidence raising lack of capacity as a tenable issue that the onus of proving testamentary capacity falls on those who seek probate.[10] As for the standard of proof, this onus must be discharged on the balance of probabilities.[11]

Typically, testamentary capacity must be proved at the time of execution. But, in accordance with *Parker v Felgate*, which Part V addresses in more detail, if the will-maker had testamentary capacity when they gave instructions for the preparation of the will, and understood at the time of execution they were engaged in executing a will, the will can be valid even if the testator has lost testamentary capacity by the time of execution.[12] As Moore-Bick LJ summarised:[13]

> What is required is due execution of a will which the court can be satisfied expressed the wishes of a testator at a time when he did have full testamentary capacity and has not been subsequently revoked.

9 *Bishop v O'Dea* (1999) 18 FRNZ 492 (CA) at [3] as cited in *Loosley v Powell*, above n 1, at [20].
10 *Bishop v O'Dea*, above n 9, at [4].
11 At [5].
12 *Parker v Felgate*, above n 3, at 173-174.
13 *Perrins v Holland* [2010] EWCA Civ 840, [2011] Ch 270 at [23] as cited in *Loosley v Powell*, above n 1, at [23].

The Court of Appeal's Clarification

The key legal dispute on appeal centred on the claim that Courtney J impermissibly considered the rationale for deviation from past bequests as a factor relevant to assessing capacity. The Court of Appeal pointed out that this was an inaccurate characterisation of her ruling but went further, stating:[14]

> There are a number of factors taken into account in assessing capacity as outlined in *Banks v Goodfellow*; including evidence of lucidity and mental command, available medical assessments, and third party observations of behaviour. A further factor can be, if the will does involve a significant change from earlier wills, the reasons for the change apparent from the factual background, or as expressed by the will-maker. *It is self-evident that the nature and reasons for a major change in a deathbed will are part of the relevant factual matrix for assessing capacity.*

As illustrated in Part IV, each of these factors played a role in the Court of Appeal's decision. The Court then helpfully located this factor within the established *Banks v Goodfellow* principles:[15]

> Apparently rational changes can support a claim of capacity, while apparently irrational changes can undermine it. Such a sudden change can be a symptom of a failure to comprehend and appreciate the claims to which the will-maker should give effect, one of the established *Banks v Goodfellow* factors.

In arriving at this conclusion, the Court pointed out that several earlier decisions in New Zealand have held that it is legitimate to draw on the rationality or irrationality of changes to a will in assessing testamentary capacity.[16] But the Court also noted that it is not required to inquire into *why* a will-maker has made a significant change at the time the will was executed. The Court emphasised that a court must not reject the will-maker's reason for a change because the court sees that reason to be unreasonable: "[a] will-maker is free to change a will and unfairly and indeed brutally disappoint expectations, providing that is done with a full understanding and capacity."[17]

Some commentary, namely that by Anthony Grant (who acted as counsel for the appellants), has described this finding as a modification of the *Banks v Goodfellow* principles, and argued that Allison's will was set aside because of this factor.[18] With respect, that appears to be overstating matters

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14 *Loosley v Powell*, above n 1, at [33] (emphasis added).

15 At [34].

16 See *Re Rhodes* HC Wellington CP25/02, 7 March 2002 at [40]; *Tavendale v Hargreaves* [2013] NZHC 2374 at [49]; and *Green v Green* [2015] NZHC 1218, (2015) 4 NZTR 25-017 at [88]–[99]. For overseas authorities, see also *Sharp v Adam* [2006] EWCA Civ 449, [2006] WTLR 1059 at [79]; *Brown v McEnroe* (1890) 11 NSWR Eq 134 at 138; *Bool v Bool* [1941] St R Qd 26 (QSC) (Full Court) at 39; and *Roche v Roche* [2017] SASC 8 at [29] and [31].

17 *Loosley v Powell*, above n 1, at [35]. As the Court of Appeal went on to note, a potential beneficiary in such a case may have resort to the statutory relief available under either the Family Protection Act 1955 or the Law Reform (Testamentary Promises) Act 1949.

18 Anthony Grant "Change your will at your peril!" (2018) 2 LawNews 4 at 4; and Anthony Grant "Invalidating wills which differ from previous wills" (2018) 11 LawNews 5 at 5.

and taking an overly prescriptive approach to the *Banks v Goodfellow* principles. First, it is clear that the Court of Appeal treated the rationality of the will as an evidential factor relevant to the inquiry of the testator's soundness of mind. The Court did not conduct a general inquiry into the "perceived morality" of the distribution and invalidate the Final Will solely on that basis.[19] The rationality factor was given no greater status than any other evidential factors which shed light on the soundness of the testator's mind, including third party observations and medical assessments. I return to this point in Part IV below.

Secondly, the propositions set out by Cockburn CJ in *Banks v Goodfellow* are not overly prescriptive. One risks taking an unduly rigid interpretation of the decision to assume only the matters explicitly mentioned are relevant in assessing testamentary capacity. The matters of which a court must be satisfied are set out in detail; less guidance is given on what evidence should be weighed in actually being satisfied of those matters. Intuitively, any inquiry into testamentary capacity will have to turn on the evidence that sheds light on the principles in *Banks v Goodfellow*, and the Court should have the benefit of considering all such evidence. The Court of Appeal's decision merely emphasised it was "self-evident" that the reasons for a major change will be relevant in assessing the testator's capacity to comprehend and appreciate the claims to which he or she ought to give effect.[20] This is an orthodox consideration in terms of the *Banks v Goodfellow* principles.[21] In doing so, the Court followed an approach taken by the High Court, various Australian courts, and the English Court of Appeal.[22]

Another helpful legal comment from the Court of Appeal concerned the role and view of a lawyer assisting a person whose testamentary capacity is questionable. The Court stated the view of the lawyer will be relevant in assessing capacity, with the value of the view turning on "the level of enquiry and discussion on the part of the lawyer of and with the deceased".[23] In an advisory turn, the Court noted it would have been best practice for the lawyer to inquire into the reasons for the will change, particularly given the poor health of the will-maker.[24]

IV FINDINGS

An equally valuable aspect of *Loosley v Powell* is the coherent approach the Court of Appeal took to resolving the issue of testamentary capacity. Satisfied

19 See *Sharp v Adam*, above n 16, at [79].
20 *Loosley v Powell*, above n 1, at [33].
21 At [33], and *Banks v Goodfellow*, above n 2, at 565–568.
22 See *Re Rhodes*, above n 16; *Tavendale v Hargreaves*, above n 16; *Green v Green,* above n 16; *Sharp v Adam,* above n 16; *Brown v McEnroe*, above n 16; *Bool v Bool,* above n 16; and *Roche v Roche,* above n 16.
23 *Loosley v Powell*, above n 1, at [51].
24 At [51].

that there were some errors of fact in the High Court decision, the Court of Appeal found it necessary to carry out its own detailed review of the facts.

At a macroscopic level, the Court of Appeal reviewed the evidence not only relating to 2 May 2014, when Allison executed the Final Will, but also in the days and weeks prior to execution. The Court noted (irrespective of the rule in *Parker v Felgate*) that Allison's capacity at her meeting with Mr McDell on 29 April 2014 was relevant to her capacity three days later.

The Court relied on the following evidence in assessing Allison's testamentary capacity on 2 May 2014:

1. *Contemporaneous nurses' observations:* several nurses took notes over the course of the morning of 2 May 2014 and noted, among other things, Allison could not "process too many questions"[25] as she was in "dire physical condition".[26] The Court preferred these observations over the pre-admission notes; the questions prompting the notes were not disclosed and the note-taker was not called to give evidence.
2. *Expert medical evidence:* there was limited direct medical evidence concerning Allison's health and her state of mind prior to her death. However, two expert witnesses gave evidence based on the documentary evidence and observations of others. The Court of Appeal noted such opinions had to be "treated with caution".[27] Of the two experts who gave evidence, the Court preferred the evidence of Dr Cheung, an old-age psychiatrist with extensive clinical experience in assessing mental capacity in older people.[28] Dr Simpson, on the other hand, was a neurologist who lacked such experience. The Court also noted Dr Cheung's statements were "measured and reasoned, and based on actual experience with elderly ill people".[29] On this basis, the Court concluded the medical evidence tended to suggest there was at least mild impairment to Allison's liver that, combined with alcohol consumption and use of Oxynorm, affected Allison's cognitive functioning. This medical finding said to corroborate the observation evidence that Allison was confused, and allowed the Court to find "she was incapable of comprehending and appreciating the claims on her estate to which she ought to give effect".[30]
3. *Other observation evidence:* no witness suggested that, by 2 May 2014, Allison was still herself and in complete command of what she was doing.[31]

This evidence allowed the Court of Appeal to conclude that the appellants had not discharged the burden of proving testamentary capacity when the Final

25 At [64].
26 At [102].
27 At [94]; and *Zorbas v Sidiropoulous (No 2)* [2009] NSWCA 197 at [65] and [80]–[89].
28 *Loosley v Powell*, above n 1, at [96] and [98].
29 At [98].
30 At [105].
31 At [105].

Will was signed. But the Court went further, concluding on its assessment "Allison plainly did not have testamentary capacity on 2 May 2014".[32]

The Court then turned to assess Allison's testamentary capacity on 29 April 2014. As well as the expert evidence noted above, which also related to Allison's state of mind in the days leading up to execution of the Final Will, the Court placed reliance on the following evidence:

1. *Observations by friends and family members:* the Court of Appeal noted that the observation evidence of Mr McDell, Mrs Farn, and the Loosley and Powell families "offer[ed] very different pictures of Allison's physical and mental state on the Rarotonga trip and afterwards".[33] Of these witnesses, the Court placed considerable weight on the evidence of Allison's friend, Dr Rowley, because he was a senior doctor who gave "detailed and measured evidence".[34] His evidence was that Allison was confused and her judgement on simple matters clouded. This evidence was supported by emails and "remained firm under cross-examination".[35]
2. *Lack of provision of chattels:* this was seen as an "indication that [Allison] was not focused".[36]
3. *Errors in handwritten records*: two diaries were produced containing handwritten notes made by Allison during the days in question. These included "a number of errors or unusual features", such as incorrect spellings and date.[37] The Court of Appeal considered that these errors reveal a person "who does not have a good understanding of the process she is undergoing" and "show a general confusion".[38] This would corroborate the evidence of Dr Rowley and the Powell family.
4. *The rationale for change*: finally, the Court went into some detail on Allison's relationship with her family and her expressed intentions over how she wished for her estate to be distributed. Two factors in particular were gleaned from this review. First, "Allison's expressed attitude and affections were changeable and not linked to particular events or changed circumstances", and secondly, from the time of her 2011 Will through to the last weeks of her life, Allison "showed a strong affection and wish to help all her nephews and niece".[39] Against that backdrop, the Court concluded Allison's instructions had "no objectively rational basis" as they "reversed the premise of equal division and were inconsistent with her long-standing feelings of affection".[40] The Court also noted her instructions were founded on a baseless premise: that Katherine and Benjamin would "fritter the

32 At [106].
33 At [108](a).
34 At [108](b).
35 At [73]–[74].
36 At [62].
37 At [76].
38 At [80].
39 At [93].
40 At [108](e).

> money away".[41] While these changes were not as extreme as in other cases, they were significant when viewed against the backdrop of the other evidence supporting a conclusion of lack of capacity.

The Court of Appeal concluded there was no clear evidence upon which to make a retrospective assessment of testamentary capacity on 29 April 2014.

The emphasis on this final factor in particular reinforced the Court of Appeal's statement that the rationale for change will be relevant in assessing the testator's ability to comprehend and appreciate the claims to which he or she ought to give effect. But despite the comments of Anthony Grant discussed in Part III, I believe it is clear the rationale for change was only one factor informing the Court of Appeal's overall conclusion, rather than a decisive consideration. It is relevant that it corroborated, rather than contradicted, the medical, documentary and observation evidence which the Court preferred. And crucially, the lack of rationale for change was not the cornerstone of the Court's conclusion, because the Court was satisfied that even if Allison had testamentary capacity on 29 April 2014, there was no evidence suggesting she had a sufficient level of understanding on 2 May 2014 to satisfy the rule in *Parker v Felgate*.

As illustrated above, the Court of Appeal ordered the evidence before it by categories. Having done so, it weighed the contradictory evidence within each category — for example, the expert medical evidence — and provided reasons for preferring particular evidence. In some cases, it was an inherent quality in the evidence, and in others, the fact it was corroborated by other reliable and credible evidence. Having discriminated between the evidence in this way, the Court was able to build a solid foundation of evidence supporting its conclusions and a clear picture of whether Allison had testamentary capacity at the relevant times.

Future courts can draw on the clear approach taken by the Court of Appeal as a template for how the multiple and often competing factors and strands of evidence can be used to arrive at a robust conclusion, either of testamentary capacity or otherwise. In particular, the Court's clear reasons for preferring certain medical notes, expert evidence and observation evidence helpfully illustrate how a clear picture can emerge from what is at first blush a complex patchwork of contradictory statements and evidence.

Costs

While not a central feature of the Court of Appeal's judgment, Courtney J's separate costs judgment was also under appeal.[42] Courtney J departed from the starting point that the estate would bear all costs in the proceeding on the basis the executors had acted unreasonably by obtaining probate before disclosing the contents of the Final Will to the Powells or Mrs Farn. Accordingly, Courtney J ordered the Loosleys to pay 20 per cent of their own costs and 20 per cent of the respondents' costs.

41 At [108](e).
42 *Farn v Loosley* [2017] NZHC 1951.

Referring to *In re Paterson (Deceased)*, the Court of Appeal stated: "in determining costs in a proceeding challenging a will or aspect of the will the reasonableness of the positions taken by the executors and claimants is central".[43] The Court agreed with Courtney J that the Loosleys were properly seen as acting as executors and that the proper starting point was costs should be met out of the estate. However, the Powells' "requests for information were reasonable, and the refusal undoubtedly set a tone of acrimony". Moreover, this refusal resulted in an extra hearing and contributed to the undue influence challenge. Accordingly, the Court could not discern an error in Courtney J's exercise of discretion and dismissed the appeal against the costs order.[44]

V A FUTURE REVIEW OF *PARKER V FELGATE*?

While the overarching themes of the Court of Appeal's judgment were consolidation and clarification, in discussing the rule in *Parker v Felgate* the Court set the groundwork for a future review of the rule's application. Because the rule was not challenged in submissions, and because of the view the Court ultimately took on Allison's capacity when she gave instructions for the Final Will, the Court did not consider this case presented an appropriate occasion to review the rule's application.[45]

But the Court's comments are nevertheless noteworthy and perhaps indicate that some members have doubts about applying *Parker v Felgate*. Indeed, the Court of Appeal described the rule in *Parker v Felgate* as having "conceptual difficulties" when assessing testamentary capacity, particularly of will-makers who are "very ill and confused at the time of execution".[46] It questioned how, in such circumstances, a court could be certain that the will-maker has not changed their mind.[47]

This criticism has some academic support. The learned authors of *Nevill's Law of Trusts, Wills and Administration* comment:[48]

> This rule … is objectionable in principle. Although it does enable some wills to be saved that would otherwise be lost, it also increases the potential for fraud in an area over which the courts must be constantly vigilant.

In the Privy Council decision in *Battan Singh v Amirchand*, Lord Normand noted this risk of abuse or fraud when a third party who stands to benefit relays instructions: "[t]he opportunities for error in transmission and of misunderstanding and of deception in such a situation are obvious".[49] The

43 *Loosley v Powell*, above n 1, at [118]–[119]; and *In re Paterson (Deceased)* [1924] NZLR 441 (SC) at 442.
44 *Loosley v Powell*, above n 1, at [123].
45 At [25].
46 At [23].
47 At [23].
48 Nicky Richardson and Lindsay Breach *Nevill's Law of Trusts, Wills and Administration* (12th ed, LexisNexis, Wellington, 2016) at [14.4.5].
49 *Battan Singh v Amirchand* [1948] AC 161 (PC) at 169.

English Court of Appeal in *Perrins v Holland* appeared to accept there is some validity of these criticisms before deciding against review of the rule:[50]

> Counsel for David submits with some force that if the validity of a will depends on both testamentary capacity and due execution logically the former should exist at the time of the latter. The cases to which I have referred demonstrate clearly that that was not and is not the law. What is required is due execution of a will which the court can be satisfied expressed the wishes of a testator at a time when he did have full testamentary capacity and has not been subsequently revoked. The reasons lie, I believe, in the freedom of testamentary disposition which the law favours, as explained by the court in *Banks v Goodfellow*, the usual preference of the court, if reasonably possible, to uphold transactions … and the pragmatic recognition in that context that the testator has no further opportunity to give expression to his wishes. Whatever the reason, the decision of the Privy Council in *Perera v Perera* is strong persuasive authority for upholding the decision in *Parker v Felgate*.

The Court of Appeal in New Zealand may be more willing to challenge this proposition, despite its "antiquity acted on for over 250 years".[51]

VI CONCLUSION

Loosley v Powell is a welcome decision, bringing greater clarity and comprehension to the determination of testamentary capacity proceedings. Despite criticism from some quarters, the case does not represent a dramatic departure from the *Banks v Goodfellow* principles. Rather, the case offers a coherent road map for how the principles can be applied to ascertain whether there is testamentary capacity in the face of a complex body of evidence. The case does, however, appear to signal the potential for a future departure from equally well-established law: the rule in *Parker v Felgate*. Commentators will undoubtedly follow that development with keen interest in the coming years.

50 *Perrins v Holland*, above n 13, at [23].
51 At [23].