Banks v Goodfellow test is still the relevant test for mental capacity over a hundred years on.

A landmark inheritance case that went all the way to the High Court confirms that the correct test for mental capacity when making a Will or looking to contest one, is that in the 1870 case of Banks v Goodfellow and not the subsequent test set out in the Mental Capacity Act 2005.

Banks v Goodfellow.

Every member of STEP will be familiar with this case. Even W ill writers are aware of it. Whenever they complete a Part B certificate in a lasting power of attorney, they say, 'I am a Will writer and I am familiar with the test for capacity in Banks v Goodfellow.'

It dates from 1870 and is still the leading authority – worldwide – on testamentary capacity and it exerts a gravitational pull on other tests of capacity, such as the test in Re Beaney for making a substantial lifetime gift.

So what actually happened in the Banks v Goodfellow case?

The chronology looks something like this:

John Banks was born in 1811 or 1812.He may have been a draper but whatever his business, he must have been fairly successful, because he ended up owning 15 cottages in Keswick. He had a **sister of the whole blood,** called **Margaret Banks.** They had a **half brother**, called **Jacob Banks**, who was the father of the plaintiff in Banks v Goodfellow.

In 1838, when he was 26 or 27, John Banks made a Will in favour of his sister, Margaret. We are told in the law report that in 1841, when he would have been 29 or 30, John Banks was confined for the first time as a lunatic in the county lunatic asylum, and that: 'Discharged after a time from the asylum, he remained subject to certain fixed delusions. He had conceived a violent aversion towards a man named Featherstone Alexander, and notwithstanding the death of the latter some years ago, he continued to believe that this man still pursued and molested him; and the mere mention of Featherstone Alexander's name was sufficient to throw him into a state of violent excitement.

On 16 March 1846, **Margaret Banks married** a grocer in Keswick named **Thomas Goodfellow**. About ten months later, on 8 January 1847, **Margaret died** shortly after giving birth to a **daughter, who was named Margaret Banks Goodfellow**. Thomas Goodfellow subsequently remarried and had a son, who was the defendant in Banks v Goodfellow. For some reason, the young niece, Margaret Banks Goodfellow, lived with her mentally infirm uncle, John Banks, and, despite the fact that he owned so many rental properties, they resided in lodgings in Arkleby with a landlady called Hannah Routledge. It is pretty obvious that both of them needed someone to look after them, and this may have been the most effective and economic way of achieving that objective. On 24 June 1860, the man toward whom John Banks had conceived a violent aversion, Featherstone Alexander, died. From September 1863 John Banks had a succession of epileptic fits. 'Shortly after he had this succession of fits, John Banks contacted his agent, Joseph Tolson, who collected the rents on his properties.

He asked Mr Tolson to bring George Ansell, a Solicitor in Keswick, with him when he came to Arkleby to pay the next half-year's rents. The interview on Wednesday 2 December 1863 Mr Tolson and Mr Ansell travelled together from Keswick to Arkleby.

John Banks told Mr Ansell that he wanted to make a Will, and: 'He fetched from his room a Will which he had made in 1838 in **favour of his sister, who had since died**, and said he wished to **give all his property to his niece, Margaret Goodfellow, in the same way**.

Mr Ansell then drafted a Will and got John Banks to sign it on an interim basis, pending the preparation of a fair copy or engrossment. This was his usual practice when dealing with clients in a rural community, when there was potentially a delay between taking instructions and the final completion of the Will. After the matter of the will had been disposed of, there was a general discussion about various business matters where John Banks suggested that Mr Tolson might care to take a lease of his cottages in Keswick for seven years, and Mr Tolson agreed and Mr Tolson handed him the current half year's rents, partly in cash and partly by cheque.. They came to just over GBP40, which he handed over partly in cash and partly by cheque.

Finally, John Banks had a conversation with his landlady, Mrs Routledge, regarding the amount he should be paying her each week for his board and lodging. Mr Ansell then returned to Keswick and arranged for the Will to be engrossed, and on the first working day after Christmas, Monday 28 December 1863, Mr Tolson returned to Arkleby with the engrossment of the Will and the lease. John Banks read them two or three times and said they were alright, after which he signed both documents and the Will was duly attested.

The deaths of John Banks and Margaret Banks Goodfellow.

About a year and a half later, on 28 July 1865, John Banks died. According to his death certificate, he died of epilepsy, insanity and coma. Under the terms of his Will, his niece, Margaret Banks Goodfellow, who was then 18, inherited his entire estate.

Margaret Banks Goodfellow herself died at Arkleby two years later, on 6 May 1867, aged 20. The effect of Margaret's death, underage and intestate, was that her estate – which included John Banks's 15 cottages in Keswick – passed to her **paternal half-brother**, who was not related in any way to the late John Banks.

The case.

John Banks junior, **the son of the testator's late half-brother, Jacob**, brought proceedings to **test the validity of the Will** made on 28 December 1863 in favour of Margaret Goodfellow. After all, his uncle had been a certified lunatic who had suffered from monomania, particularly as regards his obsession with Featherstone Alexander. The trial took place before Brett J (who later became the Master of the Rolls as Viscount Esher) at the Cumberland Assizes in the spring of 1869. It was a jury trial, and in his directions to the jury Brett J told them that the question they had to decide was: '… **whether, on the 2nd of December, 1863, or on the 28th of December, 1863, or on both, the testator was capable of having such a knowledge and appreciation of the facts, and was so far master of his intentions, free from delusions, as would enable him to have a will of his own in the disposition of his property, and act upon it.'**

The jury returned a verdict in favour of the defendant, Mr Goodfellow, saying that the **Will 'was a good and valid Will'.**

The appeal.

John Banks Jr then sought a retrial on the grounds that: Brett J had misdirected the jury; and the verdict had been reached against the weight of evidence. The alleged misdirection was that the judge: in leaving it to the jury to decide whether John Banks was free from delusions, did not proceed to tell them that the delusions, under which he had undoubtedly before laboured, might not have been present to his mind at the time of making the Will, yet, if they were latent in his mind, so that if the subject had been touched upon, the delusions would have recurred, he was of unsound mind and therefore incapable of making a Will. 'Essentially, what the appellant was suggesting is that the Solicitor, who took John Banks' instructions to make the Will, should have baited him or wound him up by saying something deliberately provocative such as: 'Are you going to leave anything to Featherstone Alexander?' As you will recall, the mere mention of that name was sufficient to throw John Banks into a state of violent excitement.

The appeal was heard by four judges of the Court of Queen's Bench, in Westminster Hall, on 11 January and 13 May 1870. The Court of Appeal, as we know it, wasn't established until 1875.The Chief Justice, Sir Alexander Cockburn, took eight weeks to write his judgment, and he handed it down on 8 July 1870.

The judgment

The Court held that, for all practical purposes, Brett J's direction to the jury had been correct. It was immaterial whether the delusions remained latent or not at the time if the testator was otherwise competent to make a Will, as the delusions had no influence upon him in disposing of his property.

One of the reasons why Banks v Goodfellow is still cited and respected as a leading authority worldwide is because the judgment contained an extensive overview of the law relating to testamentary capacity, not only in England, but in a number of other jurisdictions. The Court considered: eight earlier English cases, the earliest of which was the Marquis of Winchester's case in 1598; four French authorities, one German and one Italian on testamentary capacity; Roman law, Dutch law and five decisions in American courts, about which the judge was particularly complimentary.

'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.'

Conclusion

Recently there have been several decisions and a number of articles questioning whether the Banks v Goodfellow test is still appropriate in this day and age, and whether it has been superseded by the Mental Capacity Act 2005. There have been one or two comments to the effect that: 'Psychiatry has come a long way since 1870. Of course psychiatry has advanced considerably in the past century and a half. Nowadays John Banks would be treated by powerful anti-epileptic drugs for his succession of fits, instead of having a blister of mustard and muslin or vinegar and brown paper applied to his head, however Banks v Goodfellow has nothing to do with psychiatry. That's where the Judicial Committee of the Privy Council got it wrong in Waring v Waring. It allowed fashionable views in psychiatry or neuroscience to undermine and usurp the traditional legal test for assessing testamentary capacity. The Mental Capacity Act doesn't supersede Banks v Goodfellow, it merely complements it.

The Act requires that: **someone should be able to understand, retain, and use and weigh the information relevant to the particular decision they are making at a particular time**. What Banks v Goodfellow does is summarise – in simple and succinct terms – the information that is relevant to the decision of making a Will. Essentially, this information has been the same since time immemorial and, unless there is some major evolutionary change in human nature itself, it will continue to be the relevant information evermore.