Thy will be done: construction and rectification of wills in the Supreme Court

Robert Ham QC*

Abstract

Marley v Rawlings was the first probate case to go to the highest court in England since 1958. Robert Ham, leading counsel for the successful appellant, examines the decision of the Supreme Court, which has important implications not only for the particular case of switched wills, but also for the correct approach to the construction of wills. The revolution in the rules for the construction of contracts seemed to have left the rules for wills behind. But this case shows that the rules for wills have, in some respects, overtaken the contract rules.

The decision

Marley v Rawlings[1] was the first probate appeal to reach the highest court in England and Wales since *Wintle v Nye*[2] in 1958. It was a classic case of switched wills.

A solicitor prepared wills for a husband and wife, with each leaving everything to the survivor, and the survivor in turn leaving everything to the appellant, who had lived with them as a member of the family since his teens. Their own two sons got nothing. The solicitor and his secretary went to see the couple at home to have the wills executed and, in the unfamiliar circumstances in which he found himself, the solicitor handed the wrong will to each of the spouses. They signed the wills and the solicitor and secretary witnessed them, without the mistake being identified until after the death of the husband, whose wife had died some years earlier.

This problem has troubled courts throughout the common law world for more than a century and a half since the Wills Act 1837 introduced a general requirement for wills to be in writing and witnessed. Professor Langbein of Yale University has referred to 'recurrent' switched will cases,[3] and since the judgment of the Supreme Court more than one solicitor has told the writer (who was leading counsel for the appellant in the Supreme Court) of coming across switched wills in practice.

The early cases both in England and elsewhere held that such wills were invalid[4] and the trial judge[5] and the Court of Appeal[6] came to the same conclusion in *Marley*. However, they did so on a novel ground—that the will did not comply with Section 9 of the 1837 Act. The earlier cases were decided on the basis of lack of testamentary intent ('want of knowledge and approval') not formal invalidity; and under the original form of Section 9 the will in *Marley*, which was signed 'at the foot or end', would have been formally valid.

The Supreme Court reversed the lower courts, granting rectification of the disputed will and admitting the will as rectified to probate.

* Robert Ham QC, deputy high court judge, United Kingdom.

1. [2014] UKSC 2 [2014] 2 WLR 213.
2. [1959] 1 WLR 284.
3. See (2012) 38 ACTEC LJ 1, 8.
4. See, for instance, *In the Goods of Hunt* (1875) LR 3 P & D 250 and In the Estate of Meyer [1908] P. 353.
5. (Proudman J) [2011] 1 WLR 2146.
6. (Thomas P, Black & Kitchin LJJ) [2012] EWCA Civ 61 [2103] Ch 271

doi:10.1093/tandt/ttu154
Advance Access publication 14 August 2014

The Administration of Justice Act 1982

The possibility of formal invalidity arose only because the Administration of Justice Act 1982 had the original Section 9. Other changes made by that Act, with regard to rectification and the admissibility of extrinsic evidence as an aid to construction, also figured large in the case, and it is worth setting out the main provisions of the Act in question.

WILLS

Amendments of Wills Act 1837

17 Relaxation of formal requirements for making wills

The following section shall be substituted for section 9 of the Wills Act 1837 –''

9 Signing and attestation of wills.

No will shall be valid unless –

(a) it is in writing, and signed by the testator, or by some other person in his presence and by his direction; and

(b) it appears that the testator intended by his signature to give effect to the will; and

(c) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and

(d) each witness either –

(i) attests and signs the will; or

(ii) acknowledges his signature,

in the presence of the testator (but not necessarily in the presence of any other witness),

but no form of attestation shall be necessary.

. . .

Rectification and interpretation of wills

20 Rectification

(1) If a court is satisfied that a will is so expressed that it fails to carry out the testator's intentions, in consequence –

(a) of a clerical error; or

(b) of a failure to understand his instructions,

it may order that the will shall be rectified so as to carry out his intentions.

. . .

21 Interpretation of wills – general rules as to evidence

1. This section applies to a will –
   a. in so far as any part of it is meaningless;
   b. in so far as the language used in any part of it is ambiguous on the face of it;
   c. in so far as evidence, other than evidence of the testator's intention, shows that the language used in any part of it is ambiguous in the light of surrounding circumstances.
2. In so far as this section applies to a will extrinsic evidence, including evidence of the testator's intention, may be admitted to assist in its interpretation.

It was a central plank of the respondents' case that the 1982 Act made relatively minor changes in the law. The decision of the Supreme Court shows that it has in fact had a considerable liberalizing effect.

The arguments

In the Supreme Court the appellant ran three alternative arguments:

i. the disputed will should be interpreted as to give effect to the husband's intention;
ii. the disputed will could be 'rectified' in a broad sense at common law by admitting it to probate with omissions; and
iii. the disputed will should be rectified under Section 20 of the 1982 Act to carry out the husband's true intention by substituting references to the husband for references to the wife and vice versa.

Does the court have to construe before rectifying?

During the course of argument at least two of the justices seemed strongly attracted by the construction argument, but ultimately the Court did not feel it necessary to decide that point and instead rectified the will under Section 20. In the light of the opening words

of that section ('If a court is satisfied that a will is so expressed that it fails to carry out the testator's intentions . . .') it might have been thought that it had first to construe the will. In *Kevern v Ayres & anor*,[7] a case argued before the decision of the Supreme Court, a deputy judge of the Chancery Division (David Donaldson, QC) held that the court could not rectify a deed of variation without first construing the deed, counsel having been able to find any authority for doing so. *Marley v Rawlings* is now authority for this. (See also Merchant Navy Officers Pension Fund v Watkins [2013] EWHC 4741 (Ch) at [11].) This is a sensible pragmatic conclusion. Why should the parties have to argue, and the court decide, a difficult point of construction, where there is clear evidence of intention upon which to grant rectification?

As Lord Neuberger indicated rectification is, moreover, a more satisfactory solution than construction because it is a discretionary remedy, subject to the control of the court, whereas there is no such flexibility in the case of construction.

The approach to construction

Although the construction argument was not determinative of the case, the judgment of Lord Neuberger PSC contains an illuminating discussion of the approach to the construction of wills. In *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd*[8] Lord Hoffmann said that 'the rules . . . for the construction of wills, have not yet caught up with the move to common sense interpretation of contracts'. It is now clear that this is not the case, and that what the Law Reform Committee in its 19th Report (Interpretation of Wills) Cmnd. 5301 called the Wigram Rules[9] are a thing of the past. Lord Neuberger found support for this in Section 21 of the 1982 Act, which stemmed from that Report.

The section, reflecting the views of the minority of the Law Reform Committee, goes beyond what the majority recommended—the general admission of extrinsic evidence, except for direct evidence of intention, so as to put wills in the same position as other written instruments. The minority saw no justification for making an exception for direct evidence of the testator's dispositive intention, and in this respect the rules for wills so far from failing to catch up with those for contract have overtaken them because Section 21(2) allows indirect evidence of intention and other material, such as drafts, that would not be admissible in construing a contract. In the context of wills, where there is no question of one party relying on an objective understanding of the meaning of the will, this makes good sense. In principle, the same should apply to lifetime gifts, which perform a similar function to wills.

Be that as it may, the effect of Section 21(2) is that in an appropriate case, for example, instructions for a will, or drafts, may used as an aid to construction even though they would be inadmissible in construing any other document. One suspects (and hopes) that a good many disputes about the interpretation of wills can be resolved in this way.

Rectification by omission

The appellant's second argument was based on the decision of the New Zealand Court of Appeal in *Guardian, Trust and Executors Company of New Zealand Ltd v Inwood*.[10] It is well established that where a testator did not approve of a clause in the will it can be omitted from the will as admitted to probate. The *Guardian* case provided what may be regarded as an opportunistic way round the earlier cases on switched wills if it so happened that effect could be given to the testator's true intention

7. [2014] EWHC 165 (Ch).
8. [1997] AC 749, 780A.
9. See *Wigram* on the *Admission of Extrinsic Evidence in Aid of the Interpretation of Wills*: 'The broad picture' was according to the Law Reform Committee

> one of construing the words of the will according to their primary meaning, with the total exclusion of any other evidence of the testator's dispositive intention save in the case of equivocations [terms applicable indifferently to more than one person or thing], and a strictly limited admission of extrinsic evidence as to surrounding circumstances and possible secondary meanings of words in case of doubt.

10. [1946] NZLR 614.

by omitting words. For example, in the present case, effect could have been given to the husband's wishes by omitting references to the wife's name though in other cases, this will not be possible.

Whether or not this is the case is a matter of chance. As we put it in our written case, it is very much hit or miss. Rectification was a better solution if one could get round the need for a clerical error. It is not surprising that the Supreme Court rejected this argument.

Indeed, but for the need for either a clerical error or a failure to understand the testator's instructions under Section 20(1), there would be no continuing need for this doctrine.

Rectification

At common law, it was always assumed that a will could not be rectified—though there appears to be no actual decision to that effect. Why this should be so is not clear. Historically, the ecclesiastical courts dealt with probate disputes relating to personalty. (Disputes relating to realty were dealt with in the ordinary courts.) But just as the courts of equity could, by granting injunctions, give effect to rectification in common law courts even before the fusion of law and equity in the Judicature Act, there seems to be no good reason why they should not have done so in the case of wills, whether of realty or personalty.

A number of jurisdictions have dealt with the problem of switched wills by rejecting the idea that wills could not be rectified at common law. See *Re Snide, decd*[11], *Re Vautier*,[12] and *Henriques v Giles*:[13] and in the paper cited above Professor Langbein explains the pivotal importance of *Snide* in American law. Apart from the existence of Section 20 of the 1982 Act Lord Neuberger would have been prepared to take the same step in England. But it is difficult to see how this could properly be done, given the limited jurisdiction to grant rectification under the 1982 Act.

As already explained, that requires either a clerical error or a failure to understand the instructions. In the present case, there was no failure of understanding, so the court had to look for a clerical error. Proudman J considered this point at first instance. But she thought that, though the concept of clerical error had a wide meaning, it could not extend to something beyond the wording of the will it is sought to rectify, and that there was no error of drafting in this case. She put the following hypothetical case:

What if, instead of what actually happened, the solicitor had pulled a will prepared for a totally unconnected testator out of his briefcase and that one had been signed by mistake? It flies in the face of common sense to say that the court would have jurisdiction to rewrite the will in that situation, but there can be no ground of distinction in principle.

Following the decision of the Supreme Court it is now clear that rectification could be granted in such a case, because Lord Neuberger has held that, as a matter of ordinary language, the phrase 'clerical error' could extend to a mistake arising out of routine office work such as preparing, filing, or organizing the execution of a document, and that in the present context it should be construed in that way. This is a welcome construction of the section, taking the matter as far as it can be taken while Section 20(1) remains in force.

Section 9

There remained the question of formal validity. The courts below had held that there was non-compliance with the substituted Section 9(b) requiring that it 'appears that the testator intended by his signature to give effect to the will', and that the defect could not be cured by rectification on the ground that the jurisdiction to rectify a will under Section 20 of the 1982 Act applied only to a will that was formally valid.

11. (1981) 52 NY 2d 193 (New York).
12. (1981) 52 NY 2d 193 (New York).
13. [2009] 4 All SA 116 (South Africa).

The Supreme Court rejected both these arguments. Since the husband had unambiguously intended the document he signed to have effect as his last will and testament, and had signed it in the presence of two witnesses on the basis that it was his will, the requirements of Section 9 were satisfied. Furthermore, the word 'will' in Section 20 of the 1982 Act was not confined to a will which complied with the requirements of formal validity imposed by Section 9 of the Act, but meant any document which on its face was *bona fide* intended to be a will and which, once rectified, would be a valid will.

Conclusion

The decision of the Supreme Court has left the law in a much-improved state. It not only provides a solution to the particular problem of switched wills, but it also elucidates the correct approach to the construction of wills, bringing it largely into line with the approach applicable to other documents.

Robert Ham QC *is experienced in all areas of trust law, contentious and non-contentious, and has appeared in trust cases all over the world. In Futter v Futter he unsuccessfully defended the rule in Re Hastings-Bass in the Supreme Court. He is a deputy high court judge in England. E-mail: rham@wilberforce.co.uk*