



Rectification – Wills and Trusts

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Recent cases: Rectification of a will

Marley v Rawlings and another [2014] UKSC

A husband and wife each executed the will which had been prepared for the other owing to an oversight on the part of their solicitor. Mirror wills left estate to each other then to Mr Marley (regarded as their son). Mistake noticed only when Mr Marley died. Sons sought to inherit under intestacy. Mr Marley sought rectification.



Section 20 Administration of Justice Act 1982

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



Statutory requirements for rectification

- (1) A will
- (2) Ascertainment of the testator's intention
- (3) A clerical error, or
- (4) Failure to understand
- (5) Scope of instructions

In this case the testator's instructions were perfectly plain so there was no need to consider (5). Some cases a minefield of its own



What is a will?

The Court of Appeal asked first: is there a will? It held that if the rectification in question is so fundamental that the pre-rectification document is not “a will”, then you cannot rectify it under section 20.

Lord Neuberger disagreed in the Supreme Court. He gave three reasons:



Lord Neuberger

[1] the approach adopted by the Court of Appeal takes away much of the beneficial value of section 20. If it could not be invoked to rectify a document which was currently formally invalid into a formally valid will, that would cut down its operation for no apparently sensible reason...

[2] it appears to me that the reference to a will in section 20 means any document which is on its face bona fide intended to be a will, and is not to be limited to a will which complies with the formalities...



Lord Neuberger

[3] as a matter of statutory interpretation I can see no reason why the word “will” in section 20(1) could not be read as meaning a document which, once it is rectified, is a valid will.

Third question: how far does a “clerical error” stretch?

The Supreme Court held: far and wide.

Lord Neuberger acknowledged that this decision runs the risk of failing to discourage carelessness.



Lord Neuberger held

sections 17 to 21 of the 1982 Act are, as I see it, all aimed at making the law on wills more flexible and rendering it easier to validate or “save” a will than previously. Section 17, which re-enacts section 9, is concerned with the “relaxation” of formalities (see paragraph 14 above); sections 18 and 19 introduce greater flexibility in relation to the effect of the testator's marriage and death of his issue;



Recent Cases

section 20 introduces rectification for the first time for wills, and section 21 permits the testator's subjective intention to be taken into account for the first time. The whole thrust of the provisions is therefore in favour of a broad interpretation of a provision such as section 20(1)(a).

“Clerical error” widely interpreted – widened scope for rectification to include professional errors. Will not probably go so far as where professionals give the wrong advice.



Link to the contractual position

Lord Neuberger drew an analogy with contractual arrangements
[18] During the past 40 years, the House of Lords and Supreme Court have laid down the correct approach to the interpretation, or construction, of commercial contracts in a number of cases starting with Prenn v Simmonds [1971] 3 All ER 237, [1971] 1 WLR 1381 and culminating in Rainy Sky SA v Kookmin Bank [2011] UKSC 50, [2012] 1 All ER 1137, [2011] 1 WLR 2900.



Link to the contractual position

[19] When interpreting a contract, the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words, (a) in the light of (i) the natural and ordinary meaning of those words, (ii) the overall purpose of the document, (iii) any other provisions of the document, (iv) the facts known or assumed by the parties at the time that the document was executed, and (v) common sense, but (b) ignoring subjective evidence of any party's intentions. In this connection...



Link to the contractual position

[20] When it comes to interpreting wills, it seems to me that the approach should be the same. Whether the document in question is a commercial contract or a will, the aim is to identify the intention of the party or parties to the document by interpreting the words used in their documentary, factual and commercial context.

This flexible approach could impact significantly UK jurisprudence. Similar position relation trusts?



Recent Cases – another clerical error

Burnard v Burnard [2014] All ER (D) 51

Quite an exotic case involving an accountant, Goff and a house in Portugal and at least two companies: Grangeway **Contractors** Ltd and Grangeway **Properties** Ltd.

In his will the testator gave the shares in “properties” to his three sons in equal shares. They said he meant “contractors”, it was common ground that the testator has no interest in “properties”.



Recent Cases another clerical error

The case was decided as a matter of interpretation based on the fact that it was unclear and ambiguous enough to bring in extrinsic evidence under section 21 of the Administration of Justice Act, but there was also a claim in rectification, which was out of time.

As Goff's widow had brought an application for another claim out of time, under the Inheritance Tax (Provisions for Family and Dependents) Act 1975, Judge following *Marley* held



Recent Cases – another clerical error

It is, however right to record first that, especially in the light of the decision in Marley there would appear to be a powerful argument that there was here a clerical error in naming the wrong Company. In view of the fact that the Claimant needs an extension of time to proceed with her claim under the 1975 it is, at the moment, difficult to envisage circumstances where time would be extended for her claim and not for the rectification counterclaim.



Finally

A deed of variation was rectified in *Giles v Royal National Institute for the Blind* [2014] EWHC 1373

Lord Neuberger's application of the contractual rules of construction was approved in the dispute over Lucien Freud's will – a case of a fully secret trust

Question now – will there be any distinction for *inter vivos* trusts?