Constructing rectification

Jonathan Steinert & Paris Aboro examine the Supreme Court's approach to the rectification of a will

IN BRIEF

- Authoritative guidance on the interpretation of wills.
- Broadened scope for rectification of wills.
- Clerical error for the purposes of rectification explained.
- Commentary on the relationship between principles of construction and rectification.

In the Supreme Court's recent decision in *Marley v Rawlings* [2014] UKSC 2, [2014] 1 All ER 807 it was held that, where a husband and wife had mistakenly signed one another's draft wills, as a result of a clerical error, the court was able to intervene and rectify the wills in order to give effect to the intentions of the testator.

Background

In May 1999, Mr and Mrs Rawlings were visited by their solicitor in order that they could execute the wills he had drafted on their instructions. The wills were short and were drafted in largely identical terms, as "mirror wills". By their terms, each spouse left his or her entire estate to the other, but, if the other had predeceased, the entire estate was left to the appellant, Mr Marley, to whom the couple were not related but had treated as a son.

By an oversight on the part of the solicitor, each spouse was given the other's draft will to sign. Both the solicitor and his secretary attested the signature on each will, the mistake going unnoticed. Upon Mrs Rawlings' death in 2003, the error remained undiscovered, her estate passing to her husband. However, in 2006, Mr Rawlings died; Mr Marley acquired Mr Rawlings' share of the house they jointly owned by virtue of the doctrine of survivorship, and the error in the will finally came to light.

The respondents, Mr and Mrs Rawlings' natural sons, challenged the validity of the will which Mr Rawlings had signed. If the will were found to be invalid, Mr Rawlings would have died intestate, and his estate would therefore pass to his sons, the Respondents. If Mr Rawlings' will was valid, Mr Marley would inherit Mr Rawlings' estate.

Mr Marley brought probate proceedings. At first instance, Proudman J dismissed Mr Marley's claim for rectification on the grounds that first, the will did not satisfy the statutory requirements of a valid will, as set out at s 9 of the Wills Act 1837 (WA 1837), and second, even if it had done so, it was not open to her to rectify the will under s 20 of the Administration of Justice Act 1982 (AJA 1982). The Court of Appeal upheld that decision on the first ground, considering it unnecessary in the circumstances to consider the second ground. Mr Marley thus appealed to the Supreme Court.

The court's analysis

Overturning the courts below, the Supreme Court unanimously allowed Mr Marley's appeal. Lord Neuberger (P), with whom Lords Clarke, Sumption, Carnwath and Hodge agreed, gave the leading judgment. It was held that Mr Rawlings' will should be rectified so as to contain the typed parts of the will signed by Mrs Rawlings in place of the typed parts of the will actually signed by Mr Rawlings himself.

The interpretation of wills

Lord Neuberger's judgment is interesting not only for his analysis of the proper approach to the rectification of wills under the statute, but also for his consideration of the approach to be adopted by the courts when interpreting wills more generally.

In particular, Lord Neuberger held that the court's approach to the interpretation of wills should be essentially the same as that adopted in respect of the interpretation of other documents, whether contractual or unilateral. He summarised this approach as follows: "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."

> *"In considering the scope of this expression within its statutory context, Lord Neuberger held that a 'clerical error' should be given its broadened meaning"*

Lord Neuberger considered this conclusion was supported by the provisions of s 21 of AJA 1982, concerning the interpretation of wills. What's more, he observed, the statute actually goes further. Pursuant to s 21(2) of AJA 1982, direct evidence of a testator's intention is admissible in certain circumstances in order to interpret a will. Those circumstances arise where one or more of the requirements of s 21(1) is satisfied, including, for example, where any part of a will is meaningless or the language used is ambiguous. Such evidence thereby rendered admissible might include what the testator told the drafter of the will, or any notes he made.

In the light, however, of the court's decision on rectification, and of the fact that the possibility of upholding Mr Rawlings' will as valid as a matter of construction had not been fully argued below, their Lordships declined to determine the appeal on this basis.

Were deletions from the will appropriate?

As to the question of whether this will had been duly executed with the necessary knowledge and approval, their Lordships rejected the notion that it could be held to have been so by a process of deletion, of which the testator clearly neither knew nor approved. They held it to be quite inappropriate to invoke that principle in order to justify selecting phrases and provisions from a will intended to be signed by someone else, a process characterised as a word game with haphazard outcomes.

Was the document a "will"?

The courts below had been impressed by the argument that Mr Rawlings' will was not a will for the purposes of s 20 of AJA 1982, having arguably failed to satisfy the requirements of s 9 of WA 1837 and not having been made with the knowledge and approval of Mr Rawlings.

While accepting that the will was plainly not executed with Mr Rawlings' full knowledge and approval, Lord Neuberger was not persuaded that it failed to comply with s 9 of WA 1837. The document was intended to be a formal will and, to this end, had been signed by Mr Rawlings in the presence of two witnesses. Furthermore, it was clearly Mr Rawlings' intention, at the time of signing the will, that it should have effect as such.

Notwithstanding this conclusion, their Lordships went further. Assisted by the decision in *Re Resch's Will Trusts* [1969] 1 AC 514, [1967] 3 All ER 915 Lord Neuberger concluded that a document did not have to satisfy the formal requirements of s 9 of WA 1837, or be made with the requisite knowledge and approval, in order for it to be subject to a court of construction, and be capable of being rectified pursuant to s 20 of AJA 1982.

Their Lordships held that the reference to a "will" within s 20 of AJA 1982, applies to any document bona fide intended to be a will, or alternatively a document that once rectified constitutes a valid will, rectification operating retrospectively.

The court therefore, had little difficulty in concluding that the document in this case, as executed by the testator, was nonetheless a will for the purposes of the application of, and susceptible to rectification under, s 20 of AJA 1982.

Rectification & clerical errors

Turning then to consider the central issue of rectification, Lord Neuberger acknowledged that there had been an historic assumption that the court had no power to rectify a will, an assumption, Lord Neuberger opined, was probably misplaced. However, the point is moot, Parliament having now legislated on the subject. Section 20 of AJA 1982 grants the courts the power to rectify a will in circumstances in which it is so expressed that it fails to carry out the testator's intentions in consequence of either a clerical error or a failure to understand his instructions.

In the present case, it was not suggested that there was a failure to understand the testator's instructions. The court accordingly considered the proper interpretation of the phrase "clerical error". At first instance, Proudman J had concluded that the error in this case could not be considered a "clerical error" such as to bring this matter within the ambit of s 20 of AJA 1982. The Court of Appeal had, as explained above, not found it necessary to determine the point.

> *"It should, of course, be borne in mind that, in this case, the intention of the testator was clear, as was the solicitor's frankly acknowledged error"*

In considering the scope of this expression within its statutory context, Lord Neuberger held that a "clerical error" should be given its broadened meaning, not limited to mistakes in copying or writing out a document. On his analysis, the error in this case could be fairly characterised as clerical, because it arose in connection with office work of a routine nature such as preparing, filing, sending or organising the execution of a document.

Was the remedy sought within the scope of rectification?

In the course of his judgment, Lord Neuberger considered a further objection to the rectification of Mr Rawlings's will, the submission that the corrections to the will that were sought were too extreme to qualify as rectification. This was dealt with briefly, the court concluding as follows: "The fact the claimed correction would effectively involve transposing the whole text of the wife's will into the will does not prevent it from being rectification of each of the wills."

It was nonetheless noted that, as a general proposition, there may be force in the point that the greater the extent of the correction sought, the steeper the task for the claimant who is seeking rectification.

Practical implications

Lord Neuberger's comments concerning the interpretation of wills generally provide clear and authoritative guidance as to how the court should approach this exercise. The court's interpretation of what constitutes a "clerical error" for the purposes of rectification under s 20 AJA 1982 is, however, in our view, likely to have the most significant practical consequences.

This decision is arguably indicative of a greater willingness on the part of the courts to intervene in order to give effect to a testator's subjective intentions. Indeed, Lord Neuberger considered it was the aim of the relevant sections of AJA 1982 to introduce greater flexibility into the law of wills and make it easier to "save" a will than it had been under the common law, as previously understood. In any event, the decision is clearly evidence of a more flexible and pragmatic approach to the rectification of wills, and of the broader extent of corrections that will be contemplated as capable of being addressed by rectification.

The implications of such an interpretation must not, however, be overstated. It should, of course, be borne in mind that, in this case, the intention of the testator was clear, as was the solicitor's frankly acknowledged error. Whether or not the floodgates have been opened, as some have stated, remains to be seen.

Finally, Lord Neuberger, without deciding the point, expressed considerable sympathy with the view that, following the speech of Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] AC 1101, issues of construction and rectification have been rendered almost indistinguishable, an approach arguably inconsistent with previously established principles. This issue is of very wide-ranging significant potential import, given, for example, the absence in the field of construction of the equitable limitations on the availability of the remedy of rectification. Lord Neuberger's obiter comments are therefore of potentially broad application, beyond the scope of wills and other unilateral documents, the development of which will be watched with interest. **NLJ**

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