Neutral Citation Number: [2025] EWHC 28 (Ch)

Case No: PT-2024-BRS-000042

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 17 January 2025

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

Between :

(1) JUDI BARBARA BONHAM	**Claimants**
(2) CATHERINE JOANNA GREEN	
- and -	
(1) CAROLE STRINGER	**Defendants**
(2) JOHN STRINGER	
(3) LISA ELLIS	
(4) SALLY WATHEN	
(5) MARGARET WEBB	
(6) MARK SEABROOK	
(7) AMANDA JANE SEABROOK	

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James Rudall (instructed by **WSP Solicitors**) for the **Claimants**
The Defendants did not appear and were not represented

Hearing dates: 10 December 2024

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This judgment was handed down remotely at 10:30 am on 17 January 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

HHJ Paul Matthews :

INTRODUCTION

1. On 10 December 2024 I heard a claim made under CPR Part 8, on a claim form issued on 18 April 2024, for the rectification of the will of David Arthur Richard Seabrook deceased ("the testator"), or alternatively a declaration as to its true construction. At the end of the hearing, I said that I would make a declaration as to the true construction of the will in the sense sought by the claim, which meant that I did not need to consider the question of rectification. I said I would give reasons in writing for my decision. These are those reasons.

BACKGROUND

2. The testator died on 27 February 2019, leaving neither spouse, civil partner nor issue. His will, professionally drafted by a firm of solicitors, was dated 22 November 2017. The will appointed the partners in that firm as executors and trustees, expressing the wish that not more than two of them should prove it. Probate of this will was granted to the first claimant, one of the partners in that firm, on 2 March 2020, with power reserved to the other executors. The second claimant is another partner in the firm. The claim is supported by an affidavit of the first claimant dated 16 January 2024, and an affidavit from Niamh Marie McAlonan, the solicitor at the law firm (and then co-head of the private client department) who drafted the will, dated 5 April 2024.

3. The defendants are five beneficiaries named in the will (the first to fifth defendants), a great nephew who was named as a beneficiary in a previous well but not in this one (the sixth defendant), and another great-niece of the testator (the seventh defendant). The first six defendants confirmed that they did not wish to contest the claim. The seventh defendant did not respond to correspondence, but a certificate of service was filed which showed that service of these proceedings was deemed effected on her on 22 November 2024.

4. None of the defendants has filed any evidence. Accordingly, the only evidence before the court is that of the claimants. I did not require the witnesses to be tendered for cross-examination, because, having read the two affidavits (of two solicitors), I formed the view that they were convincing on their face and that, in the absence of any person wishing to cross-examine, there was therefore no need, especially in a case turning in the first instance on a question of construction of a document.

THE WILL

5. Clause 6 of the will dated 22 November 2017 contains a gift of the residue of the testator's estate to his trustees to hold on the trusts contained in the will. That residue is called "the Trust Fund". Clause 7 sets out those trusts. It is this clause which has led to this claim. It reads as follows:

> "MY TRUSTEES shall hold the Trust Fund ON TRUST to divide it or to treat it as being divided into four parts of equal value and to hold them on the following trusts and subject to the following provisions:
>
> (a) My Trustees shall hold those parts ON TRUST absolutely
>
> (i) as to one part for such of CAROLE STRINGER of [address] and JOHN STRINGER of [address] as shall survive me and if more than one in equal shares absolutely
>
> (ii) as to one of them for such of LISA ELLIS of [address] and her sister SALLY WATHAN of [address] as shall survive me and if more than one in equal shares
>
> (iii) as to one of them for MARGARET WEBB of [address] PROVIDED that if she dies before me or remarries during my lifetime for JOSEPH GILBERT of [address]
>
> (b) Provided also that if the trusts declared by 7(a) above in respect of any part or parts of the Trust Fund should fail then that part or parts shall accrue to the other part or parts (and equally if more than one) the trusts of which have not failed and be held on the trusts and with and subject to the powers and provisions affecting such other part or parts".

6. It will be seen that, although in the second line of the clause reference is made to division of the Trust Fund into *four* equal parts, the clause goes on to deal with only *three* of such parts. The claimants are concerned that, if the clause were construed literally, it might result in a partial intestacy whereby one quarter of the Trust Fund was held on trust for the next of kin of the testator at the date of his death. Accordingly, this claim seeks either a declaration that on the true construction of the will the Trust Fund is divided into only three equal shares, or an order that the will be rectified so as to replace the word "four" in the second line of clause 7 with the word "three".

THE LAW

The construction of wills

The old law

7. The law on the construction of wills has developed considerably in recent times. Originally, there were a great many detailed rules of construction laid down in the caselaw, and even a whole textbook devoted to them (Hawkins, *A Concise Treatise on the Construction of Wills*, 1863, now in its fifth edition, 2000). These rules were the product of a healthy respect in earlier times for the testator's ability to make testamentary gifts that might seem capricious or even foolish. In *Bird v Luckie* (1850) 8 Hare 301, 306, Knight Bruce V-C said that:

> "no man is bound to make a will in such a manner as to deserve approbation from the prudent, the wise, or the good. A testator is

> permitted to be capricious and improvident and is moreover at liberty to conceal the circumstances and the motives by which he has been actuated in his dispositions."

8. One such rule of construction was that expressed in *Constantine v Constantine* (1801) 6 Ves 100, 102, by Sir William Grant MR:

> "1 know no rule I can adopt more safely than that which 1 did adopt in *Sims v. Doughty* (5 Ves. 243. See the note, 247), and upon which 1 have always acted, viz. to give effect to every word of the will; provided an effect can be given to it not inconsistent with the general intent of the whole will, taken together … "

9. The reference in the final proviso to consistency with the rest of the will is important, and was developed by Knight Bruce LJ, sitting in the Court of Appeal in Chancery, in *Key v Key* (1853) 4 De G M & G 73, 84:

> "In common with all men, I must acknowledge that there are many cases upon the construction of documents in which the spirit is strong enough to overcome the letter; cases in which it is impossible for a reasonable being, upon a careful perusal of an instrument, not to be satisfied from its contents that a literal, a strict, or an ordinary interpretation given to particular passages, would disappoint and defeat the intention with which the instrument, read as a whole, persuades and convinces him that it was framed. A man so convinced is authorized and bound to construe the writing accordingly."

10. The same idea was expressed in more recent times by Buckley J in *Re Doland's WT* [1970] Ch 267, 272C, as follows:

> "An error in drafting is sometimes clearly apparent from a grammatical defect, when for instance some word or words have been obviously omitted by accident. Or it may be manifest from the context that a testator has at a particular point used a mistaken word or a wrong name. In such cases if the court is clear about the true intention, it will, as an exercise of interpretation, give effect to that intention and for that purpose will remould the testator's language."

11. One old rule of the construction of wills was that *circumstantial* evidence was always admissible as an aid to construction. The court was – and still is – entitled to sit in the testator's armchair, as it were, and see things as he or she saw them at the time that the will was made: *Boyes v Cook* (1880) 14 Ch D 53, 56. By contrast, another old rule was that *direct* extrinsic evidence was not admissible on questions of construction of wills, *except* for the purpose of removing a *latent* ambiguity in the language used, such as a gift of a described thing (*eg* "my Somerset farm") or to a described relative (*eg* "my cousin Emily"), which on the face of it looked clear enough, but of which the testator in fact had two (or more) such things or relatives: see *eg Re Hubbuck* [1905] P 129.

The Administration of Justice Act 1982

12. In relation to testators dying after 1982 (as this testator did), this latter rule was considerably relaxed by the Administration of Justice Act 1982, section 21. This provides as follows:

> "(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."

13. It will be seen that, in order to admit direct extrinsic evidence to assist in the interpretation of a will, including evidence of the testator's intention, one or more of the conditions in sub-s (1) must first be established. Condition (b) in effect extends the previous exception to the old exclusionary rule for *latent* ambiguity to cases of *patent* ambiguity. Conditions (b) and (c) refer to ambiguity and ambiguous respectively. These words have a wide meaning. In *Re Huntley, Brooke v Purton* [2014] EWHC 547 (Ch), for example, David Donaldson QC, sitting as a deputy High Court judge, said:

> "16. … This is a case where, after considering 'armchair' evidence of matters known to or in the contemplation of the testator, one is left with uncertainty as to what was intended by the wording of the will. Though that might not be accepted as an ambiguity in linguistic philosophy or analysis, I can see no reason why the concept in section 21 should be so constrained. On the contrary, it is in my view both desirable and appropriate that the concept of ambiguity in Section 21 of the 1982 Act should be broadly interpreted."

The modern approach

14. The modern approach to the interpretation of wills is to align it, so far as possible, with that relating to commercial contracts. In *Marley v Rawlings* [2015] AC 129 (which was the case of the construction of a will), Lord Neuberger, with whom all the other judges agreed, summarised the position for commercial contracts by saying:

> "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."

15. He continued:

> "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 …
>
> 21. Of course, a contract is agreed between a number of parties, whereas a will is made by a single party. However, that distinction is an unconvincing reason for adopting a different approach in principle to interpretation of wills: it is merely one of the contextual circumstances which has to be borne in mind when interpreting the document concerned … "

16. Lord Neuberger concluded:

> "23. In my view, at least subject to any statutory provision to the contrary, the approach to the interpretation of contracts as set out in the cases discussed in para 19 above is therefore just as appropriate for wills as it is for other unilateral documents."

The same position has been adopted for other formal but non-contractual unilateral documents, such as notices (*Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749), patents (*Kirin-Amgen Inc v Hoechst Marion Roussel Ltd* [2005] 1 All ER 667) and trusts (*Millar v Millar* [2018] EWHC 1926 (Ch); *Armstrong v Armstrong* [2019] EWHC 2259 (Ch)).

17. It may be noted in passing that, in his earlier judgment in *Royal Society for the Prevention of Cruelty to Animals v Sharp* [2010] EWCA Civ 1474, Lord Neuberger, then Master of the Rolls, had said:

> "32. One obvious difference between a bilateral document such as a contract and a unilateral document such as a will, is that parties negotiating a contract may well be consciously content to include an obscurely drafted provision, on the basis that it represents an acceptable compromise, which enables overall agreement to be reached, whereas, save in a most exceptional case, which it is hard to conceive, a person making a will has no interest in obscurity."

Despite this and other differences between bilateral and unilateral documents, it is nevertheless clear that the modern approach to the construction of wills is as stated in *Marley*.

The rectification of wills

18. So far as concerns the rectification of wills, section 20 of the Administration of Justice Act 1982 provides:

> "(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.
>
> (2) An application for an order under this section shall not, except with the permission of the court, be made after the end of the period of six months from the date on which representation with respect to the estate of the deceased is first taken out.
>
> (3) The provisions of this section shall not render the personal representatives of a deceased person liable for having distributed any part of the estate of the deceased, after the end of the period of six months from the date on which representation with respect to the estate of the deceased is first taken out, on the ground that they ought to have taken into account the possibility that the court might permit the making of an application for an order under this section after the end of that period; but this subsection shall not prejudice any power to recover, by reason of the making of an order under this section, any part of the estate so distributed.
>
> (4) The following are to be left out of account when considering for the purposes of this section when representation with respect to the estate of a deceased person was first taken out—
>
> (a) a grant limited to settled land or to trust property,
>
> (b) any other grant that does not permit any of the estate to be distributed,
>
> (c) a grant limited to real estate or to personal estate, unless a grant limited to the remainder of the estate has previously been made or is made at the same time,
>
> (d) a grant, or its equivalent, made outside the United Kingdom (but see subsection (5)).
>
> (5) A grant sealed under section 2 of the Colonial Probates Act 1892 counts as a grant made in the United Kingdom for the purposes of subsection (4), but is to be taken as dated on the date of sealing."

19. In the present case, the fact that the claim was issued on 18 April 2024, which is more than six months after the grant of probate on 20 March 2020, means that, by virtue of sub-s (2), the permission of the court is needed to make the application under sub-s (1). Guidelines for the exercise of the court's power to give permission are to be found in the decisions in *Cowan v Foreman* [2019] EWCA Civ 1336 and *Kelly v Brennan* [2020] EWHC 245 (Ch). For reasons that I will express later, I need not set these out here.

DISCUSSION

Construction

The problem

20. In the present case, the use of the phrase "four parts of equal value" in clause 7 jars with the employment of only three subclauses following. There is a clear tension in the drafting of the clause. But I am struck by the use of the phrase "divided into four parts of equal value and to hold them on the following trusts". This ties the division into *four* parts to the trusts in the following (*three*) subclauses. This is reinforced by the use of the phrase "My Trustees shall hold those parts ON TRUST absolutely", because "those parts" are the "four parts of equal value" already referred to. But the trusts immediately following are "as to one part for" A, "as to one of them for" B and "as to one of them for" C. As already stated, there are only three parts referred to. There is no fourth part.

Deliberate partial intestacy?

21. It is conceivable that a testator might wish deliberately to create a partial intestacy, for example to benefit the next of kin if they were not already the main focus of his or her testamentary intentions. But in that case the obvious way to do so would be to have a fourth subclause to follow the first three, saying something like "as to one of them for my next of kin at the date of my death". A less obvious way would be to introduce the three subclauses with some such words as "My Trustees shall hold *three of* those parts ON TRUST absolutely". But, at least in a professionally drafted will as this is, it is impossible to accept that the words in fact used by the testator demonstrate an intention to create a partial intestacy for the benefit of the next of kin.

The meaning of the language used

22. The question therefore is what that language means. In my judgment, it is tolerably clear that the word "four" was inserted in error and was intended to read "three". It is the kind of mistake that Lord Hoffmann was referring to in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, 774E-G, when he said:

> "No one, for example, has any difficulty in understanding Mrs Malaprop [in Sheridan's *The Rivals*]. When she says 'she is as obstinate as an allegory on the banks of the Nile', we reject the conventional or literal meaning of the word 'allegory' as making nonsense of the sentence and substitute 'alligator' by using our background knowledge of the things likely to be found on the banks of the Nile and choosing one which sounds rather like 'allegory'.
>
> Mrs Malaprop's problem was an imperfect understanding of the conventional meanings of English words. But the reason for the mistake does not really matter. We use the same process of adjustments when

> people have made mistakes about names or descriptions or days or times because they have forgotten or become mixed up … "

23. Thus, in that case, a notice to exercise a break clause in a lease on "12 January", was valid even though the correct date according to the terms of the lease was 13 January. The break clause required not less than six months' notice "to expire on the third anniversary of the term commencement date … " The tenant mistakenly assumed that the third anniversary was 12 January whereas it was in fact 13 January. Construed against the surrounding circumstances, including the terms of the lease, it was clear that the tenant meant to give notice for 13 January.

24. It is the same in the present case. The terms of clause 7 show that the testator had in mind to benefit three sets of people. He showed no intention to benefit his next of kin as such by way of a partial intestacy. Accordingly, the word "four" should be read as "three". The same result can also be reached by the older interpretative route of ignoring the word "four" as inconsistent with the rest of the clause and indeed the whole sense of the will. *Constantine v Constantine*, *Key v Key*, *Re Doland's WT*, and similar cases, show that this can be done. Here, indeed, "the spirit is strong enough to overcome the letter". If the clause is read as "divided into parts of equal value and to hold them on the following trusts" there will be no problem.

Section 21 of the 1982 Act

25. Moreover, in my judgment, even if I were wrong, and these interpretative processes somehow did not lead to this conclusion, it would be possible to rely on section 21(1)(b) of the 1982 Act. This would be on the basis that the language of the will was ambiguous on the face of it, using "ambiguous" in the wider sense held in *Re Huntley, Brooke v Purton*. That would let in the evidence of the first claimant and Ms McAlonan as to the testator's intentions. This evidence is to the effect that the testator's final instructions to the solicitors, after some changes of mind (which included dividing the residue into four parts), were to give the residue (the Trust Fund) upon trust for the *three* groups of beneficiaries referred to in clause 7(a)(i), (ii) and (iii), and not to divide it into quarters. The error appears to have resulted from a failure to save the final version of the draft will (a copy of which was in the evidence before me). This meant that it had to be redrafted from earlier versions, unfortunately allowing back in a stray reference to *four* parts. This only goes to reinforce the conclusion to which I had already come.

Rectification

26. Given my conclusion on the construction of clause 7, the question of rectification of the will does not arise. Accordingly, it is unnecessary for me to address the threshold question of whether permission for an application for rectification to be made should be permitted by the court, under section 20(2) of the 1982 Act, and I do not do so.

CONCLUSION

27. For the reasons given above, in my formal order I made a declaration that, on the true construction of clause 7 of the will of 22 November 2017, the Trust Fund referred to in that clause was to be divided into three parts, one part to be held upon the trusts set out in each of the three sub-paragraphs (i), (ii) and (iii) contained in clause 7(a).