Rectification

In The Light of the Supreme Court Decision In Marley v. Rawlings

The facts in Marley

1. The solicitor of Mr Marley's adoptive parents drafted wills in mirror form under which each parent left the other his or her entire estate, but in the event that the other failed to survive, the whole was left to Mr Marley.

2. However, as a result of a mistake by the solicitor, each parent signed the other's will. The mistake was not noticed following the death of the mother, but on the father's death, the parents' natural children, Terry and Michael Rawlings, challenged his will.

The will

3. The will prepared for the father was straight forward and provided:-

> This is the last will of me ALFRED THOMAS RAWLINGS of 15A Hillcrest Road Biggin Hill Kent TN16 3UA
>
> 1. I REVOKE all former wills and testamentary dispositions.
>
> 2. IF MY wife MAUREEN CATHERINE RAWLINGS … survives me by a period of one calendar month then I appoint her to be the sole Executrix of this my will and subject to my funeral and testamentary expenses fiscal impositions and all my just debts I leave to her my entire estate.
>
> 3. IF MY said wife MAUREEN CATHERINE RAWLINGS fails to survive me by a period of one calendar month I appoint TERRY MICHAEL MARLEY … to be the

> sole Executor of this my will and subject to my funeral and testamentary expenses fiscal impositions and all my just debts I leave to him my entire estate.
>
> IN WITNESS whereof I the said ALFRED THOMAS RAWLINGS have hereunto set my hand the … day of … 1999: …
>
> SIGNED by the testator in our presence and then by us in his:
>
> Signature, name, address … of attesting solicitor: …
>
> Signature, name, address … of attesting secretary: …

4. The will prepared for Mrs Rawlings was in identical terms, save that that "ALFRED THOMAS RAWLINGS" was replaced by "MAUREEN CATHERINE RAWLINGS", and "my [said] wife MAUREEN CATHERINE RAWLINGS", "her", "his", and "testator" were respectively replaced by "my [said] husband ALFRED THOMAS RAWLINGS", "him", "her", and "testatrix".

The proceedings

5. By his Claim Form, Mr Marley sought rectification under section 20(1)(a) of the Administration of Justice Act 1982 of the will executed by his father on the ground that it failed to carry out his intentions in consequence of a clerical error.

6. Terry and Michael Rawlings, who would succeed to their father's estate as next of kin in the event of intestacy, opposed rectification. It was common ground that the parents had intended Mr Marley alone to benefit on the death of the surviving parent.

7. The trial was before Proudman J., who dismissed the claim on two grounds (a) the will executed by the father was not a valid will, within the meaning of section 9 of the Wills Act 1837 (as amended) and that it was, in any event, incapable of rectification.

8. The Court of Appeal (consisting of Sir John Thomas, Black LJ and Kitchen LJ) affirmed Proudman J's decision in respect of section 9 and concluding that the question of rectification did not therefore arise. It follows that the Court of Appeal did not (in fact) consider the argument as to rectification.

9. In the Supreme Court, there is (in essence) a single Speech given by Lord Neuberger in respect of which the other four Justices agree. Lord Hodge provides a short post-script in respect of the position under Scottish Law.

Rectification

10. Generally, rectification is a form of relief that involves correcting a written instrument which, by a mistake in verbal expression, does not accurately reflect the parties' true agreement. It can correct both bilateral / multilateral arrangement (e.g. a contract), but also a unilateral document (e.g. a settlement).

11. It had always been thought that (at common law) a will could not be rectified, however Lord Neuberger was minded to find that it was open to a Judge to rectify a will in the same way as any other document. He did not so find, as Parliament had (in order to fill the perceived gap) enacted section 20 of the Administration of Justice Act 1982 ("the 1982 Act"). He found that in so far as

this provision was narrower than rectification at common law, such restriction was Parliament's intention.

12. Subsection (1) of the 1982 Act provides:-

> 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.

13. It is worth noting that sub-section (2) provides that, save with the Court's permission, no application for rectification can be made more than six months after the Grant of Probate.

14. Lord Neuberger then considered what he thought were the three possible objections that may be raised to this contention. The first is that the correction that needs to be made to validate the will is too extreme to amount to rectification.

1. It is not rectification:-

15. This was based upon the fact that it can be said that the claimed correction would effectively involve transposing the whole text of the wife's will into the will. Lord Neuberger observed that 'there may be force in the point that the greater the extent of the correction sought, the steeper the task for a claimant who is seeking rectification. However, I can see no reason in principle why a wholesale correction should be ruled out as a permissible exercise of the court's power to rectify, as a matter of principle'. He observed that this case

gave rise to a classic claim for rectification.

2. Is the document a “will”?:-

16. This was the basis of the decision at trial and in the Court of Appeal. It was argued that it was not a will (and so could not be rectified under s. 20 of the 1982 Act) because:-

(a) it failed to satisfy section 9(a) of the Wills Act 1837 (as amended);

(b) it failed to satisfy section 9(b) of the Wills Act 1837 (as amended); and

(c) in order to be a valid will, the testator must have known and approved of its contents. There is a rebuttable presumption that the testator knew and approved the contents of a regularly executed will with unexceptional provisions. However, that presumption may be rebutted by evidence of the circumstances in which the will was prepared or executed. It can also be rebutted where the will is so worded as to cast doubt on whether the testator could have known or approved of its contents. In the present case, the will, as literally interpreted, plainly did not represent Mr Rawlings's intentions: accordingly, it was accepted in the Supreme Court that he cannot have known or approved of its contents, as it stood.

17. Section 9 of the Wills Act 1837 (as amended) provides:-

> 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.

18. Lord Neuberger had a number of ways of overcoming this objection:-

19. A. It complies with s. 9(a) as, whilst the will purports in its opening words to be the will of Mrs Rawlings, there is no doubt that it cannot be hers, as she did not sign it. As it was Mr Rawlings who signed it, it can only have been his will, and it is he who is claimed in the proceedings to be the testator for the purposes of section 9;

20. B. It complies with s. 9(b) as there can be no doubt from the face of the will (as well as from the evidence) that it was Mr Rawlings's intention at the time he signed the will that it should have effect;

21. C. A document does not have to satisfy the formal requirements of section 9, or of having the testator's knowledge and approval, before it can be treated as a "will" which is capable of being rectified pursuant to section 20 of the 1982 Act. Once rectified, the testator did know and approve of its contents. Lord Neuberger's reasons for the view that these tests are applied to the rectified will were:-

(a) To do otherwise takes away much of the beneficial value of section 20;

(b) The amendments to the 1837 Act were introduced by section 17 of the 1982 Act, such that dealing with the issues of validity and rectification issues together was 'plainly more consistent with the evident purpose of the amendments made to the law of wills';

(c) A will which is invalid as a will, can still be admitted to probate, relying on dicta of Lord Wilberforce in ***In re Resch WT*** [1969] 1 AC 514 @ 547E;

(d) 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 that complies with the formalities; alternatively the word "will" in section 20(1) could be read as meaning a document which, once it is rectified, is a valid will (especially as rectification operates retrospectively);

(e) Rectification is available in other areas where formalities are required for validity, and the example of land contracts is given.

3. Is it a clerical error?

22. The claim was not advanced on the basis that it fell within paragraph (b), "a failure to understand [the testator's] instructions". Of course there was an error; the issue was whether it can be said to be "clerical". As a matter of ordinary language, the expression "clerical error" can have a narrow meaning, which would limit it to mistakes involved in copying or writing out a document, and would not include a mistake of the type that occurred in this case. The expression also can carry a wider meaning, namely a mistake arising out of

office work of a relatively routine nature, such as preparing, filing, sending and organising the execution of a document. Lord Neuberger observed that 'Those are activities which are properly … described as "clerical", and a mistake in connection with those activities, such as wrongly filing a document or putting the wrong document in an envelope, can properly be called "a clerical error".

23. Lord Neuberger considers the authorities (the first instance ones supporting a narrow meaning) and after noting that what he was attempting to divine was the rational and coherent basis for rectification under section 20, decided that it should be given the wider meaning because:-

(a) (Picking up on the point already made) at common law, rectification of other documents is not limited to cases of clerical error (however defined), such that there is no apparent reason for a different rule for wills;

(b) There is no apparent limit on the applicability of section 20(1)(b), which supports the notion that section 20(1)(a) should not be treated as being of limited application;

(c) The policy behind sections 17 to 21 of the 1982 Act are all aimed at making the law on wills more flexible and rendering it easier to validate or "save" a will than previously.

(d) The law would be somewhat incoherent if subtle distinctions led to very

different results in cases where the ultimate nature of the mistake is the same.

24. It follows that it contains the typed parts of the will signed by the late Mrs Rawlings in the place of the typed parts of the will signed by Mr Rawlings.

Other interesting aspects of the decision

25. There are two other aspects of the Judgment which are equally interesting (although ultimately the Supreme Court did not decide the matter on these grounds).

26. The rules for construing wills:- Whilst for some time I have been advising on the basis that the modern rules on Construction of Contracts applied to the interpretation of wills (rather than the specific and often different rules which were said to apply only to wills), such an approach was confirmed by the Supreme Court. It follows that the rules for the interpretation of wills are the same as for commercial contracts. These rules are found in the line of cases (including Lord Hoffman's speech in ***Investors Compensation*** [1998] 1 WLR 896) ending with the decision of the Supreme Court in ***Rainy Sky SA v. Kookmin Bank*** [2011] 1 WLR 2900.

27. However, there is additional statutory gloss on this, as Section 21 of the 1982 Act (headed "Interpretation of wills—general rules as to evidence") provides:-

> (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.

28. Whilst section 21(1) is consistent with the modern rules on construction, Lord Neuberger observed that section 21(2) goes rather further, as if one or more of the three requirements set out in section 21(1) is satisfied, then direct evidence of the testator's intention is admissible, in order to interpret the will in question. It follows that there can be interpretation by reference to evidence of the testator's actual intention. The example given are by reference to what he told the drafter of the will, or another person, or by what was in any notes he made or earlier drafts of the will, which he may have approved or caused to be prepared.

29. Is there now a difference between construction and rectification? I have left this point until last, as it is the most difficult conceptually.

30. The starting point is Lord Hoffman's fifth proposition in ***Investors Compensation*** where he says:- "if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had".

31. This was developed by Lord Hoffmann in ***Chartbrook Ltd v Persimmon***

Homes Ltd [2009] AC 1101, where having observed that the exercise of interpretation involves "decid[ing] what a reasonable person would have understood the parties to have meant by using the language which they did" and referring to the "correction of mistakes by construction", he said:

> there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant.

32. Lord Neuberger noted that such an approach has been criticised, as the difference between construction and rectification would be reduced almost to vanishing point. But there is a difference between them, for example the Court has a discretion to refuse rectification.

33. The Court then declined to express any view on this issue, although (of course) Lord Hoffman's approach would have seen Mr Marley succeed.

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