What's the point? – some questions in the interpretation of wills

COMMENTARY BY DANIEL PETRIDES, 8TH JULY 2021

In *Wood v Capita* [2017] UKSC 24, Lord Hodge boldly declared that *"the recent history of the common law on contractual interpretation is one of continuity rather than change"*.[1] At a high level of principle this is true: the 'modern' approach formulated by Lord Hoffmann in his landmark judgment in *Investors Compensation Scheme Ltd v West Bromwich* [1996] UKHL 28; [1998] 1 W.L.R. 896 remains an authoritative summary of the exercise in which the courts are engaged when construing written instruments.[2] But the judicial implementation of that exercise in the intervening period has revealed significant differences in judicial taste, with the cases in the years immediately following *ICS* appearing to favour contextualism and purposive interpretation, while more recent decisions following *Arnold v Britton* [2015] UKSC 36 have signalled an apparent (re)turn to textualism, and a greater reluctance on the part of the courts to interfere with the bargain which the parties appear (objectively) to have concluded.

[1] [19].

[2] The court's aim is to determine *"the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract"* (*ICS* at 912).

Some types of instrument have been partially sheltered from this storm by unique considerations arising from their purpose or status.[3] Wills are not among them. In *Marley v Rawlings* [2014] UKSC 2 Lord Neuberger – building on his own earlier judgment in *RSPCA v Sharp* [2010] EWCA Civ 1474 – held that, subject to the intervention of statute, the approach to construing wills should be the same as that adopted by the courts when interpreting commercial contracts. But given the apparent flux in the prevailing approach to interpreting commercial contracts, can this really be the case in practice?

A will, being a unilateral instrument, does not represent a compromise between competing interests; its sole purpose is to express the testamentary wishes of a testator. Accordingly, it is suggested that purposive construction should have a greater role to play in the interpretation of wills than it does in the prevailing approach to interpreting bilateral contracts, where the language used is the sole record of the transitory confluence of competing intentions at the moment when the contract is executed. While certainty is of paramount importance in preventing satellite disputes which may diminish the deceased's estate and create tension between potential beneficiaries, it is surely a corollary of English law's preference for testamentary freedom that the courts should not adopt an unduly technical approach to construction which may frustrate the intentions of the testator where imperfectly expressed.

In keeping with this, the approach of both Parliament and the courts reflects a greater willingness to go behind (or beyond) the language used in the will itself, and therefore appears closer to the pre-*Arnold* approach.

The most notable example is s.21 of the Administration of Justice Act 1982, which represents a substantial departure from the approach to the construction of contracts. As is well known, s.21 permits the court, in cases of meaninglessness or

[3] For example, Land Registry documents (*Cherry Tree Investments Limited v Landmain Limited* [2012] EWCA Civ 736), the articles of association of a company (*Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10) and pension trust deeds (*Barnardo's v Buckinghamshire* [2018] UKSC 55).

ambiguity, to undertake the otherwise heretical act of using extrinsic evidence of the testator's subjective intention as an aid to construction.[4]

This frequently operates as a gateway to the controversial practice of rectification by construction. In *Marley* itself, the Lord Neuberger declined to reach a definitive view on the "*difficult question*" of whether a will could be rectified by way of construction in the way envisaged by Lord Hoffmann in *Chartbrook.*[5] However, subsequent decisions lend support to the view that this is permissible, and even desirable. So, for example, in *Slatterly v Jagger* [2015] EWHC 3976 (Ch) HHJ Hodge QC cured the mistaken omission of the identity of the beneficiary from a will by way of construction.[6]

Similarly, in *Knipe v British Racing Drivers' Motor Sport Charity* [2020] EWHC 3295 (Ch) the court was confronted by a will which purported to leave the residue of the deceased's estate to several charitable organisations, one of which was named as 'The British Racing Drivers Club Benevolent Fund'. The only difficulty was that no such charity in fact existed. On the executor's application to the court for directions, it was held that this should be construed as a reference to the British Racing Drivers' Motor Sport Charity, the benevolent arm of an unincorporated association called the British Racing Drivers' Club of which the deceased (who was a professional racing driving) had been a member for many years. The judge pithily reasoned that "*this is a simple case of construing the words in the will in the context in which the deceased used them*".[7]

However, there are limits on how far the courts will go to cure ambiguity. In particular, it seems that the courts will generally be more reluctant to have recourse to the concept of 'common sense' than in cases involving professionally drafted commercial contracts. Although there is a longstanding convention that wills are construed against outcomes which would be manifestly capricious or frustrate the purposes of the will

[4] The continuing prohibition on this in the contractual context was firmly upheld in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38.

[5] [22] – [23]; cf. *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 in which a reference to '13th January' in a break notice was, famously, construed as a reference to '12th January'.

[6] See [95].

[7] [15].

by creating a partial intestacy, the courts have also long recognised that private individuals may deal with their own property in ways that result in what may be regarded morally or financially undesirable outcomes.[8] Therefore, aside from its power to redistribute the estate under the Inheritance (Provision for Family and Dependants) Act 1975, the courts will usually refuse interfere with the testamentary freedom of the deceased by re-writing the will in a way that it considers would be fairer or more practicable.[9] Furthermore, following Lord Walker's hostility towards the suggestion that the court should rescue parties from the adverse tax consequences of their mistakes in *Pitt v Holt* [2013] UKSC 26, it also seems doubtful that the courts will resolve ambiguity in the most tax-advantageous way for the estate.

One unintended consequence of the combined effect of s.21 and the court's greater interpretative interventionism would appear to be to limit the scope for the doctrine of rectification in cases concerning wills. The power to rectify wills – which was once thought not to exist at common law – was created by s.20 of the Administration of Justice Act 1982. The power under s.20 is limited to failures in expression arising from "*clerical error*" or "*failure to understand* [the testator's] *instructions*". Interestingly in *Marley* Lord Neuberger suggested in *obiter* at [28] that, had s.20 not existed, he would have been "*minded to hold that it was, as a matter of common law, open to a judge to rectify a will in the same way as any other document*". It is not clear whether he envisaged that the doctrine would have wider application that the narrow circumstances laid down in s.20.

As is well known, *Marley* itself – in which a couple's solicitor mistakenly gave them each other's wills to sign – was resolved by way of rectification. It was held that the term "*clerical error*" should be given a wide meaning so as to capture an error of this nature. This is a fair and pragmatic outcome, but one which still leaves the statutory power considerably narrower than any common law equivalent may be. This in turn creates the risk that some cases may fall between the operation of s.21 and statutory rectification.

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[8] Although it should be noted that serious irrationality on the face of a will may be a factor casting doubt on the testator's capacity – see for example *Sharp v Adam* [2006] EWCA Civ 449.

[9] See *Illott v The Blue Cross* [2017] UKSC 17.

Take the example of *Re Butlin's Settlement Trusts* [1976] Ch 251, the leading case on rectification of unilateral settlements, in which the settlor had included a provision allowing the trustees to act by "*unanimous decision*", mistakenly believing that the word 'unanimous' was a synonym for 'majority'. Brightman LJ granted rectification of the trust deed due to the unilateral mistake of the settlor, but it is not clear either of the gateways for s.20 to be engaged would have allowed a similar result to be reached if the instrument in question had been a will. Furthermore, it seems unlikely that s.21would have been engaged due to the absence of ambiguity. If clear evidence of a mistake on the part of the testator (especially a lay testator drafting a will without professional advice) exists, it would seem unjust that this should not be capable of rectification; whether the courts will definitively extend the common law doctrine of rectification to cover wills remains to be seen.

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