

Construction of Wills

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1. Overview: A summary of the principles the court applies in deciding issues on the proper construction of a Will and consideration of some of the case law in this area.

Principles of construction of a Will

2. In *Thomas v Kent*¹ Chadwick LJ at paragraph 17 sets out that in construing a Will the court has to put itself, as it were, in the armchair of the testator and interpret the words which the testator had used in the light of the facts and circumstances which were known to him. This process reflects the need to take account of the circumstances in which a testator used the words, in seeking to understand what a testator meant by those words. In *Scarfe v Matthews*² it was held that the essential question is always, what did the testator say, expressly or by necessary implication.

3. In *Marley v Rawlings*³ at paragraphs 19 to 23 the Supreme Court set out the factors which must be considered in determining a Testator's intentions for the purpose of construing the Will. The court will identify the meaning of the relevant words in the light of:

- (1) The natural and ordinary meaning of those words;
- (2) The overall purpose of the document;

¹ [2006] EWCA Civ 1485 . Citing the unreported case of *Cooksley v Cole* 8th November 2002 Neuberger J, paragraphs 29 to 31.

² [2012] EWHC 3071 (Ch), (Transcript) N Strauss QC – sitting as a Deputy Judge of the High Court. At paragraph 20. The Court cited Theobald on Wills 17th edition at paragraph 15-003 and Williams on Wills 9th edition paragraphs 50.1 and 57.3.

³ [2014] UKSC 2, [2015] AC 129, 144-145. Applied in *Slattery and Jagger v Jagger* [2015] EWHC 3976 (Ch) at paragraph 86.

- (3) Any other provisions of the document;
- (4) The facts known or assumed by the Testator at the time the Will was executed; and
- (5) Common sense.

4. At paragraphs 20 Lord Neuberger said that when it came to interpreting a will, it seemed to him that the approach should be the same as for a contract: *“Whether the document in question [was] a commercial contract or a will, the aim [was] to identify the intention of the party or parties to the document by interpreting the words used in their documentary, factual and commercial context”*. At paragraph 23 Lord Neuberger said that: *“...subject to any statutory provision to the contrary, the approach to the interpretation of contracts ... is ... just as appropriate for wills as it is for other unilateral documents.”*

5. It is useful to consider and contrast the different processes for the construction of a will as compared to the construction of a contract. In the construction of a contract the court adopts an objective approach, as was restated and explained by Lord Clarke in the case of *Rainy Sky SA v Kookmin Bank*⁴ in which he stated: *“... the ultimate aim of interpreting a provision in a contract, especially a commercial contract, is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant. As Lord Hoffmann made clear in the first of the principles he summarised in the Investors Compensation Scheme case ... the relevant reasonable person is one who has 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.”* Lord Clarke explained⁵: *“The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has 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, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other.”* So far as possible each part of the contract must be given effect to and read in a way that avoids inconsistencies.

⁴ [2011] UKSC 50 paragraph 14.

⁵ Paragraph 21.

6. The principles of construction of a contract in the *Rainy Sky* case have recently been restated by the Supreme Court in the case of *Arnold v Britton*⁶, a case concerning a service charge clauses in leases of chalets. In *Arnold v Britton* the majority reasoning of their lordships included a number of propositions⁷. First, that the reliance placed in some cases on commercial common sense and surrounding circumstances should not be invoked to undervalue the importance of the language of the provision which was to be construed. The exercise of interpreting a provision involved identifying what the parties had meant through the eyes of a reasonable reader, and save in a very unusual case, that meaning was most obviously to be gleaned from the language of the provision. Second, when it came to considering the centrally relevant words to be interpreted, the less clear they were or the worse their drafting, the more ready the court could properly be to depart from their natural meaning. However, that did not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. Third, commercial common sense was not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, had worked out badly, or even disastrously, for one of the parties was not a reason for departing from the natural language. Commercial common sense was only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made. Fourth, while commercial common sense was a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appeared to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of the wisdom of hindsight. The purpose of interpretation was to identify what the parties had agreed, not what the court thought that they should have agreed. Fifth, when interpreting a contractual provision, one could only take into account facts or circumstances which had existed at the time that the contract had been made, and which had been known or were reasonably available to both parties. Sixth, in some cases, an event subsequently occurred which had plainly not been intended or contemplated by the parties, judging from the language of their contract. In such a case, if it was clear what the parties would have intended, the court would give effect to that intention.

7. The court's approach to the construction of a contract apply to the above principle from *Marley v Rawlings* limb (1) of considering *The natural and ordinary*

⁶ [2015] UKSC 36. Paragraph 15.

⁷ [2015] UKSC 36. Paragraphs 17 to 23 and 66.

meaning of the words' . In particular in seeking to understand the meaning of a particular word by considering the overall context and circumstances in which the Testator made the Will.

8. The recent approach of the courts has been to give greater weight to the natural meaning of the words as opposed to looking at the commercial common sense of the result. in Marley v Rawlings Lord Neuberger at paragraph 42 referred to Mr Justice Nicholls's judgment in the case of In re Williams decd⁸ where Mr Justice Nicholls was recorded to have taken an orthodox view of interpretation "...if, however liberal may be the approach of the court, the meaning is one which the word or phrase [could not] bear, [Mr Justice Nicholls could not] ...see how ... the court [could] declare that meaning to be the meaning of the word or phrase..." Mr Justice Nicholls' view was that: "...varying or contradicting the language used, would amount to re-writing [of a will which was] ...to be achieved, if at all, under the rectification provisions in section 20."

Subjective Evidence of Intention and Extrinsic Evidence

9. Unlike the position for the construction of a contract, the court in construing a Will can rely upon subjective evidence, that is evidence of the Testator's subjective intentions. This evidence is permitted under section 21 of the Administration of Justice Act 1982 ('AJA') (see Marley v Rawlings at page 145, paragraphs 24 to 26).

10. Section 21 of the AJA states:

"(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."

⁸ [1985] 1 WLR 905.

11. In *Marley v Rawlings* Lord Neuberger at paragraph 26 explained the application of this section: “...where section 21(1) applies, a will is to be interpreted in the same way as any other document, but, in addition, in relation to a will, or a provision in a will, to which section 21(1) applies, it is possible to assist its interpretation by reference to evidence of the testator's actual intention ([that is] 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).”

12. In determining the admissibility of extrinsic evidence under section 21(1)(b) of the AJA the court will consider whether a particular word or phrase is ambiguous on its face. Where there is more than one meaning for a word or phrase, this requirement is satisfied⁹.

13. As stated by Nicholls J. in *Re Williams*¹⁰: “The evidence may assist by showing which of two or more possible meanings a testator was attaching to a particular word or phrase. “My effects” and “my money” are obvious examples. That meaning may be one which, without recourse to the extrinsic evidence, would not really have been apparent at all. So long as that meaning is one which the word or phrase read in its context is capable of bearing, then the court may conclude that, assisted by the extrinsic evidence, that is its correct construction.”

Whether particular words create a trust or take effect as an absolute gift to executors

14. Both under the older case law and the modern approach to construction where on the wording there is uncertainty as to the objects to be benefitted this is a good ground for holding that precatory words (words expressing a desire) create no trust¹¹.

15. *Paice v Archbishop of Canterbury*¹² is authority for the proposition that dispositions to executors which contain a discretionary component can be correctly interpreted as gifts to the executors and not trusts (the will having stated “I commit to the discretion of my executors”).

⁹ Hawkins on the Construction of Wills (2000), 5th Edition paragraph 2.64 (see generally 2.55 to 2.66).

¹⁰ [1985] 1 All ER 964 at page 969.

¹¹ Hawkins On the Construction of Wills (2000) 2nd Edition paragraphs 18-04 and 18-23. Chapter 18 contains a useful summary of the entire approach to the issue of whether there is an intention to create a trust, in particular see paragraph 18-01.

¹² (1807) 14 Ves 364. Cited in Williams on Wills (2014), 10th Edition paragraph 82.7 footnote 2.

16. In *Gibbs v Rumsey*¹³ the will provided for a disposition “unto such Person and Persons and in such Manner and Form and in such Sum and Sums of Money as they in their Discretion shall think proper and expedient.” The court determined that this should be constituted as an absolute gift to the executors as opposed to a failed trust.

17. These two cases of *Paice* and *Gibbs* were decided prior to the Executors Act 1830, at a time when the court was more inclined to find a trust than a gift so as to avoid the executors taking the residue by default¹⁴. This factor increases the weight to be given to the reasoning in these cases that such precatory words indicate that an absolute gift was intended.

18. Warrington J. in *Re Howell*¹⁵ considered a will which stated “the remainder or residue of my property (if any) shall be at the discretion of my executor and at his own disposal”. He ruled that the residuary estate was taken by the executors in that capacity so it was held on trust by them for the next of kin. The Court of Appeal overturned his decision in *Re Howell*¹⁶ ruling that the will provided a gift to the executor. Lord Cozens-Hardy M.R (at p.244) held: “*The construction of the gift must depend on the language of the will, and I do not accept the proposition that an executor cannot take a legacy for his own benefit unless it is shown irresistibly that the right conclusion must be, without any doubt whatever, that he is intended to take it for his own purposes.*”¹⁷

19. Lord Cozens-Hardy M.R. was clear that the lack of an express or implied declared trust indicated a gift to the executor and the key significance of there being a sole executor (rather than two or more executors) ultimately meant the executor must take beneficially (at page 244): “*I know of no case which in any way applies to a will like this, in which there was no trust declared either expressly or by implication prior to the gift of residue to the executor, and there was a sole executor, and it was held that the executor did not take beneficially.*”

20. An absolute gift was found in the case of *Lambe v Eames*¹⁸ where property was left to a testator’s widow “to be at her disposal in any way she may think best, for the

¹³ (1813) 2 Ves & Bea 294. The case of *Paice* was not relied upon and the court reached a similar conclusion.

¹⁴ *Re Skeats* [1936] Ch 683, 686. The misplaced ‘cruel kindness’ of seeking to find a trust was referred to by James LJ in *Lambe v Eames* (1871) LR 6 Ch App 597 at 599.

¹⁵ [1914] 2 Ch 173.

¹⁶ [1915] 1 Ch 241, 243-244.

¹⁷ Both the cases of *Gibbs v Rumsey* and the Court of Appeal decision in *Re Howell* were followed by Pennycuik J in *Re Pugh’s Will Trusts* [1967] 3 All ER 337, 342.

¹⁸ (1871) LR 6 Ch App 597, 599.

benefit of herself and family". This was held to be a gift. The court noted that the testator intended his widow to deal with the property as she pleased and it would be a violation of his wishes for the court to determine a trust existed (at page 599).

21. In *Re Messenger's Estate*¹⁹ the will contained a sole disposition ("*I give and bequeath to my daughter Mrs. E. A. Chaplin*"). Mrs E.A. Chaplin was also the executor of the deceased's estate. The court noted that it was clear the testator had intended to divest himself of his property and the process of construction of the Will should avoid the farce of intestacy, therefore the testator must have intended for Mrs Chaplin to take beneficially regardless of her position as the executor.

22. In *Re Pugh's Will Trusts*²⁰ there were several dispositions in the will in that case. Clause 6 of the will specified "*...unto my trustee absolutely and I direct him to dispose of the same in accordance with any letters or memoranda which I may leave with this my will and otherwise in such manner as he may in his absolute discretion think fit*". The court (at page 341) held this to be a trust due to the reference to "*my trustee*" and the mention of letters or memoranda. Pennycuik J. (at page 341) specifically noted that "*...if the gift had been 'I give my residuary estate unto my trustee absolutely to dispose of the same in such manner as he may in his absolute discretion think fit' that would be construed as a beneficial gift to the plaintiff.*" Pennycuik J was pointing out that it was much easier to infer an intention that a sole executor should take beneficially than that two or more executors should do so.

23. Whilst an express trust can arise without the word 'trust' being used a review of the case law in *Re Pugh*²¹ shows that clear words are required to create a trust. The review of the cases considered five cases, in three of which the word 'trust' or its derivative was expressly used. The other two cases show very clear words to create a trust, being *Re Chapman*²² '*... retained by my executor for such objects and such purposes as he may in his discretion select*'; and *Re Rees*²³ '*unto my trustees absolutely they well knowing my wishes concerning the same ...*'

24. In the Canadian case of *Re Daniels*²⁴, a decision in the Court of Appeal of Alberta, the court construed the Will as creating trusts. The court relied upon the

¹⁹ [1937] 1 All ER 355, 356.

²⁰ [1967] 3 All ER 337.

²¹ [1967] 3 All ER 337, 339 – 341.

²² [1922] 2 Ch 479. Cited at [1967] 3 All ER 337, 340.

²³ [1949] 2 All ER 1003. Cited at [1967] 3 All ER 337, 340.

²⁴ (1991) ABCA 288.

following factors to come to the trust outcome. Firstly, the Will contained other clauses leaving legacies before the residuary clause that was being construed. Secondly, the devise was to 'my executors' rather than to named individuals. Thirdly, there were two executors. Fourthly, those two executors had been left separate and different legacies earlier in the Will in which they were named individually and not referred to in their capacity as executors (see the judgment paragraphs 12 and 15).

25. The court must apply common sense in its construction. One aspect of this is the presumption against intestacy. If there is doubt as to the proper construction and one possible construction would result in an intestacy then the Court can apply the presumption against intestacy²⁵. This has been described as the golden rule of construction: *"There is one rule of construction, which to my mind is a golden rule, viz., that when a testator has executed a will in solemn form you must assume that he did not intend to make it a solemn farce, - that he did not intend to die intestate when he has gone through the form of making a will. You ought, if possible, to read the will so as to lead to a testacy, not an intestacy. This is a golden rule. I do not deny that this will may be read in two ways, or that it requires that a blank should be filled up. But it may be read in such a way as not to amount to a solemn farce."* (*Re Harrison*²⁶).

A recent case as an example of some of these principles

26. The case of *Amiee Shannon Steed (a Child by her litigation friend, Marilyn Joy Winn)* was a two day Will construction trial on 16th and 17th March 2016 before Mr Justice Newey in the Chancery Division of the Bristol District Registry. The Defendant was the testator's father and the sole executor of the Estate under a homemade Will which contained only one operative provision stating: *"I,...,give authority to my Father to dispose of all my possessions and affairs as he feels appropriate."*

27. By the time of the trial both parties acknowledged that the Will was sufficiently ambiguous for extrinsic evidence to be brought into the construction exercise in accordance with section 21 of the Administration of Justice 1982. However the Claimant's case was that such evidence was of little, if any, assistance to the court.

28. The issues for determination by the court were:

²⁵ Williams on Wills (2014), 10th Edition paragraph 51.1.
²⁶ (1885) 30 Ch D 390, 394.

- (1) Did the wording of the Will show an intention by the testator to leave his estate as an absolute gift to his father?
- (2) Alternatively, did the wording of the Will show an intention to create a trust?
- (3) Would either a gift or a trust fail on the basis that there had been an impermissible delegation of testamentary power as per Chichester Diocesan Fund and Board of Finance Inc v Simpson²⁷?

29. It was not disputed that if the Court found the Will showed an intention to create a trust then the trust failed due to the uncertainty over the objects of the trust and/or administrative unworkability. In that case the testator's father would hold the estate on trust in his capacity as executor for the Claimant, as the person who would benefit under the intestacy provisions.

30. Mr Justice Newey determined that the Will contained an absolute gift to the testator's father and was not to be construed as showing an intention to create a trust. The Court found assistance from the extrinsic evidence of the persons who had witnessed the Will, who had questioned the testator about his intentions for his estate. The Court reasoned that the natural meaning of the words did not show an intention to impose any binding constraint upon the father and this was supported by a number of authorities, including Paice v Archbishop of Canterbury and Gibbs v Rumsey. Of particular relevance was the case of Re Howell, and the passage from page 244 in which Lord Cozens-Hardy M.R. stated "*I know of no case which in any way applies to a will like this, in which there was no trust declared either expressly or by implication prior to the gift of residue to the executor, and there was a sole executor, and it was held that the executor did not take beneficially*".

31. As to the issue of impermissible testamentary delegation, the court considered that any rule that may exist against the delegation of testamentary powers would not be relevant in relation to a gift to an absolute beneficiary. The Court provided an example whereby a husband was able to leave his wife an absolute gift of his estate in the expectation that she would then decide how best to benefit their children. It would not be an impermissible delegation of testamentary powers for the husband not to specify how his wife must divest herself of the estate as between the children. Consequently, there was no question of there being an impermissible testamentary delegation in the

²⁷ [1944] A.C. 341.

case before the court. The Court did not need to resolve the Defendant's submission that Hoffmann J.'s critical analysis in the case of *Re Beatty*²⁸ had not reduced the significance of the rule against the delegation of testamentary powers said to arise from Lord Simons' speech in *Chichester Diocesan Fund and Board of Finance (Incorp) v Simpson*²⁹.

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²⁸ [1990] 1 WLR 1503, 1507.

²⁹ [1944] AC 341, 371.