When will rectification save a will that is otherwise invalid?

The position at common law / equity

1. The position at common law / equity is that where a Will does not record the testator's intentions there are only limited circumstances in which the error can be corrected by:

   (1) Showing a lack of knowledge and approval of a passage in the Will, so as to exclude it from probate.

   (2) The process of construction of the meaning of the words in the Will so as to correct a mistake.

2. **Knowledge and Approval**. The Court will not admit a document to probate without being satisfied that the testator knew and approved the contents. A testator can have knowledge and approval of part of a will but not of another part[1]. This is the case even if the whole of the document is read over to the testator[2].

3. An example illustrates how assertions of a lack of knowledge and approval can be used in effect to rectify a Will by deleting words. *In Re Morris deceased*[3] a testator had made a series of twenty bequests in clause 7 of her will, each bequest was in a sub-clauses using roman numerals. After executing her Will she wished to revoke the bequest in clause 7(iv). A codicil was prepared, in error it referred to revoking the whole of clause 7 and not just clause 7(iv). The codicil was read over to her and she and the solicitor did not notice the error. The Court approved a passage from Mortimer's Probate Practice: *"Where the mind of the draftsman has*

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1 *Morrell v Morrell* (1881) 7 PD 68. *Wightman v Rynette-James* [1976] 1 WLR 161, 168B.

2 *Wightman v Rynette-James* [1976] 1 WLR 161, 167G. The will was read over to the testator (163H).

3 [1971] P 62, 80. Latey J.

never really been applied to the words in a particular clause, and the words are introduced into the will per incuriam, without advertence to their significance and effect, by a mere clerical error on the part of the draftsman or engrosser, the testator is not bound by the mistake unless the introduction of such words was directly brought to his notice.". The Court held that the use of '7' was a mere clerical error and a slip and the testator did not have the sufficient knowledge and approval of the mistaken use of the '7' to admit that part of the will to probate and that the testatrix was not bound by this mistake of the draftsman which was never brought to her notice. *"Accordingly, the case is one in which the court has power to rectify, using that word in a broad sense..."* The Court pronounced against the '7' part of the codicil and admitted the rest of the codicil to probate, as this got closer to the testator's intentions than refusing probate to the whole codicil.

4. Whilst leaving out part of a will from probate may leave part of what remains as being devoid of meaning and inoperative, this will be allowed if overall this gets nearer to the intentions of the testator[4].

5. **Construction**. If satisfied on the construction of the will as a whole that there is a mistake or omission, the Court can correct a mistake from inferences taken from the whole will[5]. The Court is not altering the words but giving them their fair meaning in their context. To show that there is a mistake that requires a word in a will to be construed as a different word there has to be stronger evidence than is required to help resolve an ambiguity between two meanings of a word in a will[6].

6. Under section 21 of the Administration of Justice Act 1982, the Court can bring in to the construction exercise permissible extrinsic evidence:

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[4] *Wightman v Rynette-James* [1976] 1 WLR 161, 167H. The editors of Williams on Wills come to a contrary view, paragraph 5.7.

[5] Williams on Wills paragraph 5.8. *Morgan v Thomas* (1882) 9 QBD 643, 646.

[6] *Morgan v Thomas* (1882) 9 QBD 643, 646. *"You require a context of a different character to show that the testator has made a mistake in writing one word for another from what you do when you wish to ascertain which of two meanings that the word properly bears is to be affixed to it".*

21. Interpretation of wills--general rules as to evidence

(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

7. Rectification. Before section 20 of the Administration of Justice Act 1982 the equitable discretionary remedy of rectification of a unilateral document was not available in probate, so as to add or alter words. The policy reason being that if the Court varied the words of the document then the strict formality requirements for the execution of the document under the Wills Act 1837 would not have been complied with for those words[7].

8. Section 20 of the Administration of Justice Act 1982 introduced the jurisdiction to rectify Wills in certain circumstances.

Section 20(1) of the Administration of Justice Act 1982

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

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[7] *Wightman v Rynette-James* [1976] 1 WLR 161, 166F Templeman J *'any document other than a will could be rectified by inserting the words which the secretary omitted, but in this respect the court is enslaved by the Wills Act 1837. Words may be struck out but no fresh words may be inserted'.* See also *Morrell v Morrell* (1881) 7 PD 68, 70 *'If ... a mistake is made, it matters not how plainly, in leaving out words, ... we cannot after his death correct that, because his intention would not have been put into writing and attested as the law requires'*.

(b) of a failure to understand his instructions,

it may order that the will shall be rectified so as to carry out his intentions."

9. In *Re Segelman deceased*[8] Chadwick J set out the three questions for the Court on an application to rectify under section 20(1):

(1) What were the testator's intentions with regard to the dispositions in respect of which rectification is sought?

(2) Is the Will so expressed that it fails to carry out those intentions?

(3) Is the Will so expressed in consequence of either (a) a clerical error or (b) a failure on the part of someone to whom the testator has given instructions in connection with his Will to understand those instructions?

10. What were the testator's intentions? The court will admit extrinsic evidence of the testator's intentions with regard to the relevant dispositions.

(1) Often the evidence of the solicitor taking the instructions will be crucial. Extrinsic evidence will be admitted.

(2) The standard of proof is the balance of probabilities.

(3) The probability that a Will which a testator has executed in circumstances of some formality reflects his intentions carries such weight that the Court will require 'convincing proof' before making a finding to the contrary[9], i.e. the

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8 [1996] 1 Ch 171, 180D.

9 *Segelman deceased* [1996] Ch 171, 184B.

'contrary' being that the testator intended his Will to contain a different provision[10].

11. Does the wording of the Will match the testator's intentions? This is a question of construction. Has there been a mistake? The mistake can take the form of words being included that should have been left out[11], or words being left out that should have been included[12].

12. If there is a mistake was it caused by (a) 'a clerical error'?

(1) A 'clerical error' means an inadvertent error made in the process of recording the intended words as part of the drafting or transcription of the Will[13]. Such a 'clerical error' can include a failure to follow the testator's instructions. Where a testator gave instructions to alter her existing Will so as to change specific bequests but to leave other clauses unaltered, but in error one of those clauses was omitted, this was held to be a 'clerical error'[14].

(2) A 'clerical error' also occurs where the draftsperson never really applies their mind to the particular words[15]; or the draftsperson fails to appreciate the

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10 *Bell v Georgiou* [2002] WTLR 1105, at paragraph 8. *Boswell v Lawson* [2011] EWCA Civ 452, paragraph 51, 53. Clear and plain language in the Will supports a finding that the wording of the Will was in accordance with the testator's intentions.

11 *Segelman deceased [1996] Ch 171, 186E.*

12 *Bell v Georgiou [2002] WTLR 1105, at paragraph 8.*

13 *Wordingham v Royal Exchange Trust Co [1992] Ch 412, 419-420, Evans-Lombe QC. The Judge held that if he was wrong and the power to rectify did not arise then he would have been inclined to strike down the whole Will as not having received the full knowledge and approval of the testator.*

14 *Wordingham v Royal Exchange Trust Co [1992] Ch 412, 418 Evans-Lombe QC. The solicitor had drafted the will using a new precedent but with the old will in front of him. By mistake one of the clauses of the old will, containing the exercise of a power of appointment, was left out.*

15 *Wordingham v Royal Exchange Trust Co [1992] Ch 412, 418 approving the comments of Latey J in Re Morris, see paragraph 3 above. Clarke v Brothwood [2006] EWHC 2939 (Ch) Behrens J paragraphs 41 and 42, where the draftsperson correctly records the instructions but fails to consider that they do not deal with the entire residuary estate. See also Pengelly v Pengelly [2008] Ch 375 paragraph 24 it was a clerical error in not implementing the testator's instructions by not limiting the beneficiaries to those listed, so as to create a valid trust.*

significance or effect of the introduction or deletion of a particular provision[16].

(3) Who can make a 'clerical error'? It is not just the clerk writing out the draft. The testator can make a 'clerical error' in writing out their own home made will[17].

(4) In the case of *Marley v Rawlings*[18] due to the error of the solicitor a husband and wife each executed the other's mirror Will. The husband executed the wife's draft Will and the wife executed the husband's draft Will. The requirement in section 9(b) of the Wills Act 1837 that *'it appears that the testator intended by his signature to give effect to the will ...'* was not met[19]. Signing the wrong document rendered the entire document invalid as a Will. There was no valid document available to be rectified before admission to probate.

(5) In the *Marley* case Proudman J also held that if she was wrong on the effect of the Wills Act 1837 then a 'clerical error' does not include the scenario where the testator mistakenly signs the wrong document. The Court held that for a 'clerical error' the error could not extend to something beyond the wording of the Will[20]. The mistake as to which document was signed was an error that went beyond the wording of the Will, as it was not an error of

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16 *Re Segelman deceased [1996] Ch 171, 186E. In error the operative clause in the precedent used by the solicitor was* typed up omitting the words 'leaving issue' from the substitution clause for issue of those named in a schedule of a Will. This limited the effect of the schedule such that a beneficiary could only benefit if their named ancestor was dead, which was not the testator's intention. The client's schedule of names included after some of the names 'and issue', such that there was no need for any substitution clause. It was a 'clerical error' for the solicitor to mistakenly fail to appreciate the need to delete the substitution clause once the testator's schedule had been prepared naming persons 'and issue'.

17 *Re Williams deceased* [1985] 1 WLR 905, 911-912 Nicholls J (obiter – as the case concerned section 21). The passage is cited with approval in *Wordingham v Royal Exchange Trust Co* [1992] Ch 412, 418F. *Re Segelman deceased* [1996] Ch 171, 186E.

18 [2011] WLR 2146 paragraph 29. Proudman J.

19 Judgment paragraphs 21 and 25.

20 Judgment paragraphs 28 and 29.

drafting. It appears that this would be the case even if the document as signed contained all or many of the provisions reflecting the testator's intentions for the disposition of the estate.

13. Alternatively, If there is a mistake was it caused by (b) a failure to understand the testator's instructions?

(1) This power to rectify applies where the draftsperson does not understand the testator's instructions.

(2) Section 20 does not apply where the draftsperson understands the testator's instructions but fails to understand the legal effect of the words used in the Will[21], i.e. the intended expression is used but it produces the wrong result. If it is apparent from the solicitor's file that the draftsman did understand the testator's instructions but simply misapplied the law then the disappointed beneficiary should have a claim in professional negligence but will not be able to apply to rectify the Will.

(3) Similarly, if the testator fails to appreciate the effect of words deliberately used then rectification is not available[22]. Nor will section 20(1) apply where the testator never had any intention relevant to the events which actually occurred[23].

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21 Williams on Wills paragraph 6.3. The Law Reform Committee considered that such a power of rectification was appropriate for Wills – 19th Report on the Interpretation of Wills (1973 cmnd 5301 paragraph 20.

22 *Marley v Rawlings* [2011] 1 WLR 2146 paragraph 8. Proudman J.

23 *Bell v Georgiou* [2002] WTLR 1105, at paragraph 8.

(4) The failure to understand needs to be by a person other than the testator. Typically this will refer to a solicitor retained to prepare a Will, or a relative or friend helping write out a Will, or a testator dictating his or her Will to a typist. Section 20(b) has no application where the testator writes out his or her own handmade Will and in error uses the wrong language so that it does not give effect to his or her intentions.

(5) Having established that the Will fails to carry out the testator's instructions the Court will not grant rectification unless there is 'convincing evidence' as to the content of the testator's instructions[24]

(6) There is likely to be a further hurdle of showing that the testator still intended those same instructions at the time of the execution of the Will[25].

14. **Time Limit**: There is a 6 month time limit under section 20(2) within which to bring an application to rectify.

(1) Time runs from the grant of probate, ignoring certain limited grants. The section replicates the provisions of section 4 of the Inheritance (Provision for Family and Dependants) Act 1975. The 1975 Act case law is likely to be relevant on an application made for permission to bring a rectification claim after the 6 months time limit has expired[26].

(2) Personal Representatives are not liable for distributions made after the 6 month deadline, if the Court entertains a late application to rectify the Will[27]. The Court can make orders for the recovery of any asset distributed[28].

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24 *Goodman v Goodman* [2006] EWHC (Ch) at paragraph 18 Evans-Lombe J.

25 *Goodman v Goodman* [2006] EWHC (Ch) at paragraph 19.

26 Relevant 1975 Act cases to apply by analogy on an application for permission to bring a claim to rectify outside the 6 month time limit; *Re Salmon* [1981] Ch 167; *Chittock v Stevens* [2000] 1 WTLR 643, *McNulty v McNulty* [2002] 1 WLR 737.

27 Administration of Justice Act 1982 section 20(3).

15. **Procedure**. If probate proceedings have not been commenced then an application under rule 55(1) of the Non-Contentious Probate Rules 1987 (as amended) can be made to a District Judge or a Registrar of the Family Division who can make an order for rectification, if the application is unopposed.

(1) An affidavit is required setting out the grounds, specifying whether reliance is placed on 20(1)(a) or (b), and giving evidence of the testator's intention.

(2) Notice must be given to those who might be adversely affected by the change in the rectification of the Will so that they can have the opportunity to comment on the application. Any comments made by such persons must be exhibited in evidence. If the application is contested then the application should be brought in the Chancery Division.

(3) The County Court's jurisdiction is restricted to estates worth up to £30,000 in value[29].

(4) If the Court or Registrar orders rectification then an engrossment of the Will in its rectified form should be lodged at the Probate Registry for the Registrar's fiat[30].

16. If the proceedings are contested then the application to rectify the Will should be made in the Chancery Division[31]. The Court has the power to exercise the

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28 Administration of Justice Act 1982 section 20(3).

29 County Court Jurisdiction Order 1981. By agreement the parties can confer jurisdiction on the County Court regardless of the value of the estate, section 24(2)(b) County Court Act 1984.

30 Williams, Mortimer & Sunnocks – Executors, Administrators and Probate 19th Ed. paragraph 21-32.

31 CPR 57.12 and PD 57. The grant has to be lodged in Court. 57PD10.

rectification jurisdiction in a probate action. As there are contested facts CPR Part 7 is appropriate. The order must be made by a High Court Judge[32].

Due Execution – Barrett v Bem

17. Section 9 of the Wills Act 1837 provides, as substituted by section 17 of the Administration of Justice Act 1982: *"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; …"*

18. *Barrett v Bem*[33] establishes that the requirement in Wills Act 1837 section 9a that the Will is *'signed by … some other person in [the testator's] presence and by his direction'* is not met by the testator's mere acquiescence or mere passivity in allowing someone to sign for them. To amount to a 'direction' something active on the part of the testator is required in the nature of an instruction, a positive and discernable communication[34].

19. Where a testator signs the Will himself then in relation to a 'guided hand signature' something positive and discernable from the testator is required beyond mere passive physical contact with the wielder of the pen[35].

20. To amount to a 'direction' under section 9a the positive and discernable communication may be verbal or non verbal. However if the testator is capable of express communication then that is the mode that may be expected[36].

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32 2BPD paragraph 5.1(g).

33 [2012] 3 WLR 330. CA 31.1.12. This was the first time the Court of Appeal had considered the issue and there was little High Court authority on the point.

34 At page 342G-343B. Paragraphs 35, 36. At page 338D. Paragraph 21.

35 At page 341H. Paragraph 33 and at page 333E. Paragraph 37.

36 At page 339A, Paragraph 24.

21. In *Barrett* the trial judge's referred to the testator's conduct in attempting to sign the Will with his sister Anne's help to steady his hand, by allowing his sister Anne to take the pen and by allowing her to sign the Will. The trial judge held that this conduct should be taken as a direction by conduct to sign the Will for him[37]. The Court of Appeal held that this was not enough to amount to a direction. It was not enough that the testator had wanted to sign the Will and had tried and failed to sign it personally[38]. It was significant that the testator was alert and able to communicate his wishes but had said nothing.

22. **Practice** As a point of practice an attestation clause should show that the Will is signed by another person signing his own or the testator's name, by the direction of and in the presence of the testator, and that it had been read over to the testator and that he appeared thoroughly to understand it[39].

23. **Benefit**. The provision in section 15 of the Wills Act 1837[40] (rendering gifts to an attesting witness void) does not apply to render a gift to the person directed under section 9(a) to sign for the testator as void. The Court of Appeal suggested that Parliament change the law so that beneficiaries are not permitted to execute a Will in their own favour in any capacity[41].

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37 At page 336H. Paragraph 15.

38 At page 333E. Paragraph 37.

39 At page 343B. Paragraph 36.

40 Section 15 Gifts to an attesting witness, or his or her wife or husband, to be void ... *if any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will.*

41 At page 344B. Paragraph 39.

Mistake; *Pitt v Holt*

24. *Pitt v Holt*[42]; P suffered serious brain damage in a road accident. P's wife C1 was appointed his receiver by the Court of Protection. P obtained damages by a compromise approved by the court. C1 took advice from financial advisors and a discretionary settlement was proposed under which the beneficiaries would be P, C1 and their children. The Court of Protection authorised C1 as receiver for P to execute a settlement. No consideration was given to the inheritance tax implications on P's death[43]. The form of settlement adopted was such that a liability to inheritance tax arose[44]. After P's death C1 sought declarations that C1 was entitled to avoid the settlement under the Rule in Hastings-Bass.

25. In the related *Futter v Futter* case trustees of discretionary trusts exercised powers of enlargement in favour of the life tenant and powers of advancement in favour of beneficiaries, on a mistaken view of the capital gains tax legislation. These acts triggered a CGT liability rather than avoiding a liability.

26. The so called Rule in *Hastings-Bass* had previously been formulated as: "*Where a trustee acts under a discretion given to him by the terms of the trust, but the effect of the exercise is different from that which he intended, the court will interfere with his action if it is clear that he would not have acted as he did had he not failed to take into account considerations which he ought to have taken into account, or taken into account considerations which he ought not to have taken into account.* "[45]

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42 [2012]] Ch 132, CA 9.3.11 (and on appeal to the Supreme Court)

43 Page 779D. Had the settlement included a clause requiring that half the trust fund applied during P's life be applied for his benefit then the settlement would have been exempt from Inheritance Tax, s.89 Mental Health Act 1983.

44 On the £1.4m settlement the tax charge would have been at least an initial £100k on the initial settlement in 1994 and then a further £200k to £300k on P's death in 2007.

45 Lloyd LJ in *Sieff v Fox* [2005] 1 WLR 3811 para. 49, restating the positive form of the rule formulated by Warner J in *Mettoy Pension Trustees v Evans* [1990] 1 WLR 1587, 1621H. Lloyd LJ's

27. The Court of Appeal held that the decision in *Hastings-Bass*[46] does not support that formulation. The important point was that in *Hasting –Bass* the Court rejected the proposition that in order for the trustees to exercise their discretionary power of advancement they must weigh the benefits and have a proper understanding of the effect of the advancement[47]. Buckley LJ's summary contained a negative proposition: "*where by the terms of a trust ... a trustee is given a discretion as to some matter under which he acts in good faith, the court should not interfere with his action notwithstanding that it does not have the full effect which he intended, unless ...it is clear that he would not have acted as he did (a) had he not taken into account considerations which he should not have taken into account, or (b) had he not failed to take into account considerations which he ought to have taken into account*" [48]. This was not part of the ratio of the case.

28. In the *Holt* case the Court of Appeal held that (1) an act outside the scope of the powers is void[49]; (2) an act which is within the scope of the powers of the trustees but which had been done in breach of their fiduciary duty to take into account relevant matters or to leave out of account irrelevant matters is voidable[50], and not void.

29. Trustees who fulfilled their duty of skill and care by seeking professional advice, whether in general or specific terms, from a proper source and acted on the advice so obtained did not commit a breach of duty even if, because of

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formulation was approved by Sir Andrew Park in *Smithson v Hamilton* [2008] 1 All ER 1216 at para 52, describing it as a comprehensive synthesis of the law. *Pitt v Holt* paragraph 29 and 94.

46 [1975] Ch 25. See *Pitt v Holt* paragraph 32.

47 Paragraphs 50 , 58 and 65.

48 *Hastings-Bass* case page 41G.

49 Paragraph 96.

50 Paragraph 99.

inadequacies in the advice given, they acted under a mistake as to a relevant matter[51].

30. The fiscal consequences of an act would often be among the relevant matters which ought to be taken into account.

31. In the *Pitt* case C1 had acted within the terms of the power conferred on her by the Court of Protection and had not been in breach of fiduciary duty since she had taken advice from a proper source, even though, because of the inadequacy of the advice given, she had not taken into account the liability to inheritance tax which would arise[52].

32. In the *Futter* case the enlargement and the advancements had been within the claimants' powers under the respective settlements and the claimants had not acted in breach of trust since they had acted on advice from appropriate solicitors as to the tax consequences of what they were doing, even though, because the advice was wrong, they had been mistaken as to those consequences[53].

33. The *Pitt* case settlement and the *Futter* case enlargement and the advancements were neither void nor voidable.

34. *Mistake.* The Court of Appeal held in the *Pitt* case that the equitable jurisdiction to set aside a voluntary disposition for mistake could be invoked only where there had been a mistake on the part of the donor, as to either the legal effect of the disposition or an existing fact which is basic to the transaction. In addition the mistake must be of so serious a character as to render it unjust on the part of the donee to retain the property given to him. The fact that a mistake gave rise to

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51 Paragraph 124-125, 127

52 Paragraphs 161 - 163.

53 Paragraphs 143 – 144.

unforeseen tax liabilities is a consequence, not an effect, of the disposition and is not sufficient to bring the jurisdiction into play[54].

35. In the *Pitt* case C1 had been under a mistaken belief at the time of the settlement that it had no adverse tax implications. That mistake was not as to the legal effect of the settlement but as to its consequences and so provided no basis for invoking the equitable jurisdiction. C1 could not avoid the settlement on the basis of mistake[55].

36. We await the Supreme Court's consideration of the appeal in *Pitt v Holt*.

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54 Paragraph 210.

55 Paragraph 224.