

Interpretation, rectification, and variation: choosing the right tool for the Will

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23rd November 2023



Agenda

1. Interpretation
2. Rectification
3. Procedure: points to note
4. A mention for variation

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What do contracts, patents, and wills have in common?



The ordinary approach

Marley v Rawlings [2014] UKSC 2; [2015] A.C. 129

- Lord Neuberger of Abbotsbury PSC at [25]-[26]:

*“In my view, section 21(1) confirms that **a will should be interpreted in the same way as a contract, a notice or a patent**, namely as summarised in para 19 above. In particular, section 21(1)(c) shows that **evidence is admissible when construing a will, and that that includes the surrounding circumstances...**”*

The ordinary approach

Marley v Rawlings [2014] UKSC 2; [2015] A.C. 129

- Lord Neuberger at [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.”

Application of the ordinary approach

Internal evidence from the Will

- Overall purpose
- Other provisions
- Common sense

The facts known or assumed by the parties at the time that the document was executed



The armchair principle: the limits

Perrin v Morgan [1943] A.C. 399

- Lord Romer at 420:

"I take it to be a cardinal rule of construction that a will should be so construed as to give effect to the intention of the testator, such intention being gathered from the language of the will read in the light of the circumstances in which the will was made. To understand the language employed the court is entitled, to use a familiar expression, to sit in the testator's armchair. When seated there, however, the court is not entitled to make a fresh will for the testator merely because it strongly suspects that the testator did not mean what he has plainly said..."



The armchair principle: in action

Re Bracey [2022] EWHC 359 (Ch)

- Philip Mott KC at [62]

“Such relevant facts are as follows:

i) The Testator had been diagnosed with Lewy Body Dementia, which would be progressive, so that there was little or no realistic prospect of his having the capacity to change his will in future.

ii) The Beneficiary, Mrs Irene Bracey, was herself very ill with sleep apnoea and requiring oxygen treatment.

iii) As a result, there could be no clear expectation that the Beneficiary would survive the Testator, or vice versa.”

Departing from the ordinary approach

Marley v Rawlings [2014] UKSC 2; [2015] A.C. 129

- Lord Neuberger of Abbotsbury PSC at [25]-[26]:

“In my view, section 21(1) confirms that a will should be interpreted in the same way as a contract, a notice or a patent, namely as summarised in para 19 above. In particular, section 21(1)(c) shows that evidence is admissible when construing a will, and that that includes the surrounding circumstances...

However, section 21(2) goes rather further.** It indicates that, **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.

*Accordingly, as I see it, save 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** (e.g. 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).”*



Departing from the ordinary approach

S21 Administration of Justice Act 1982

“(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.”



Departing from the ordinary approach

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*(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.***”



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Interpretation vs rectification

Marley v Rawlings [2014] UKSC 2; [2015] A.C. 129

- Lord Neuberger at [40]:

“At first sight, it might seem to be a rather dry question whether a particular approach is one of interpretation or rectification...”



Interpretation vs rectification

Marley v Rawlings [2014] UKSC 2; [2015] A.C. 129

- Lord Neuberger at [40]:

“At first sight, it might seem to be a rather dry question whether a particular approach is one of interpretation or rectification. However, it is by no means simply an academic issue of categorisation. If it is a question of interpretation, then the document in question has, and has always had, the meaning and effect as determined by the court, and that is the end of the matter. On the other hand, if it is a question of rectification, then the document, as rectified, has a different meaning from that which it appears to have on its face, and the court would have jurisdiction to refuse rectification or to grant it on terms (e.g. if there had been delay, change of position, or third party reliance).”

Rectification: the statute

S20 Administration of Justice Act 1982

*“(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.”



Rectification: the statute

S20 Administration of Justice Act 1982

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Rectification: the statute

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“(1) If a court is satisfied that a will is so expressed that it fails to carry out the testator’s intentions, in consequence—

*(b) of a **failure to understand his instructions**”*

Rectification: the limits

Marley v Rawlings [2014] UKSC 2; [2015] A.C. 129

- Lord Neuberger:

"[53] As a general proposition, 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. On the contrary: to impose such a restriction on the power of rectification would be unprincipled and it would also lead to uncertainty."

Rectification: a warning

Kell v Jones [2013] WTLR 507

- Must be a failure to carry out testator's intentions because of (a) or (b)
- Drafter's mistake as to legal effect of words chosen deliberately is neither a clerical error nor a failure to understand instructions



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Procedure

Interpretation

- Personal representatives obliged to take steps to have true meaning determined by the court if doubtful
- Parts 64 and 8 of the CPR
- Alternative route: s48 Administration of Justice Act 1985

Rectification

- Part 57 of the CPR if opposed
- 6-month time limit

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Variation

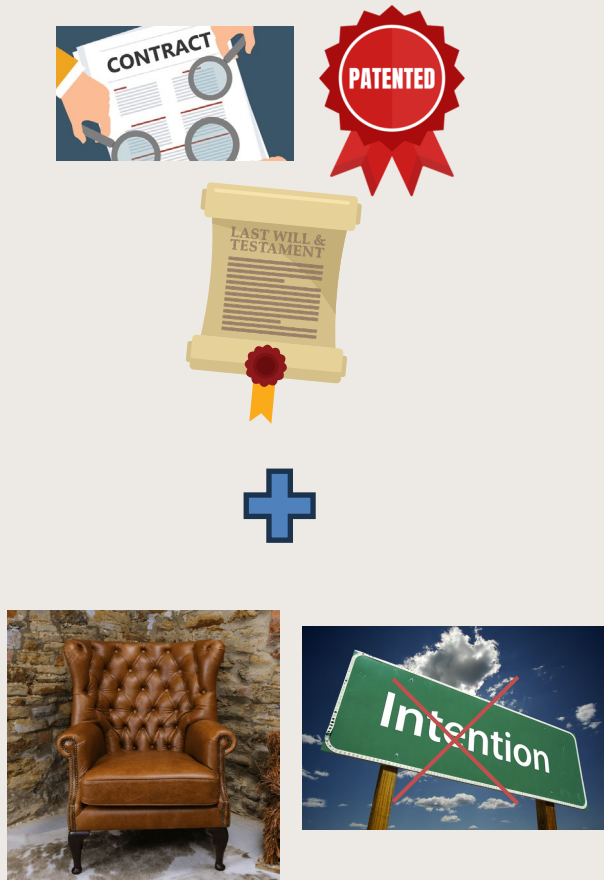
- Will as interpreted does not achieve the desired result
- Rectification not available
- Tax

Recap

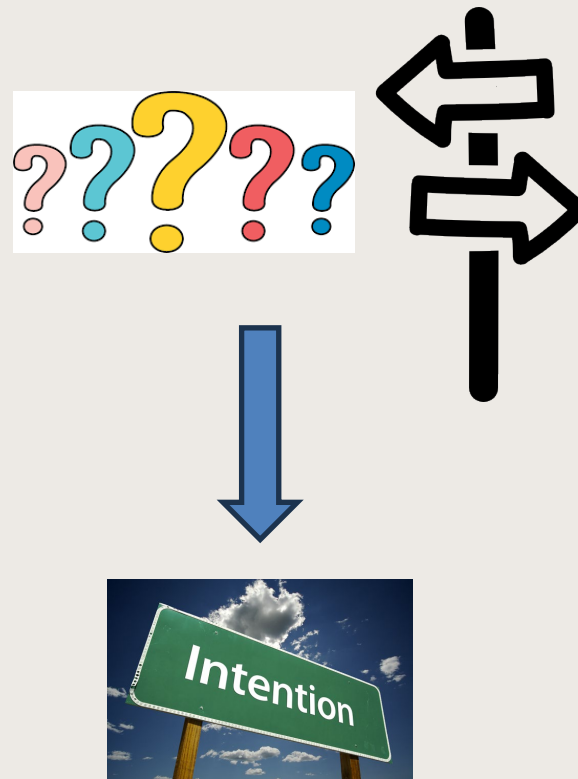


Recap

Interpretation: ordinary



Interpretation: s21



Rectification



Questions?

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