**DIFFICULT ISSUES IN RELATION TO THE CONSTRUCTION OF WILLS**

We are all aware of the extraordinary facts which arose in the case of **Marley v Rawlings** [2014] UKSC 2. A husband and wife gave instructions for mirror image wills under which each left his or her estate to the other and the survivor left his estate to the appellant. Unfortunately by mistake the solicitor who drafted the wills gave each the wrong one to sign so that the husband signed the one intended for the wife and vice versa. The wife died first and the error was not noticed. The husband took her estate. On the later death of the husband the error was picked up and the respondents who would take his estate on intestacy challenged the admission of the will to probate. The appellant argued that the will should be rectified or it should be construed so as to validate it. At first instance and in the Court of Appeal the respondents were successful on the basis that only a valid will could be rectified. This will was not valid as it was not executed in accordance with section 9 of the wills Act. A will could not be rectified to make it valid. The beneficiaries under the intended will appealed to the Supreme Court and succeeded. The Court ordered rectification. Despite that decision Lord Neuberger explained that the approach to interpretation of the will now followed the modern contextual approach to interpretation of contracts as set out in **Investors** C**ompensation Scheme Ltd v West Bromwich Building Society** [1998] 1 WLR 896. What Lord Neuberger said is as follows:

*17. Until relatively recently, there were no statutory provisions relating to the proper approach to the interpretation of wills. The interpretation of wills was a matter for the courts, who, as is so often the way, tended (at least until very recently) to approach the issue detached from, and potentially differently from, the approach adopted to the interpretation of other documents.*

*18. During the past forty years, the House of Lords and Supreme Court have laid down the correct approach to the interpretation, or construction, of commercial contracts in a number of cases starting with Prenn v Simmonds [1971] 1 WLR 1381 and culminating in Rainy Sky SA v Kookmin Bank [2011] 1 WLR 2900.*

*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. In this connection, see Prenn at 1384-1386 and Reardon Smith Line Ltd v Yngvar Hansen-Tangen [1976] 1 WLR 989, per Lord Wilberforce, Bank of Credit and Commerce International SA v Ali [2002] 1 AC 251, para 8, per Lord Bingham, and the survey of more recent authorities in Rainy Sky, per Lord Clarke at paras 21-30.*

*20. When it comes to interpreting wills, it seems to me that the approach should be the same. Whether the document in question is a commercial contract or a will, the aim is to identify the intention of the party or parties to the document by interpreting the words used in their documentary, factual and commercial context. As Lord Hoffmann said in Kirin-Amgen Inc v Hoechst Marion Roussel Ltd [2005] 1 All ER 667, para 64, “No one has ever made a contextual statement. There is always some context to any utterance, however meagre.” To the same effect, Sir Thomas Bingham MR said in Arbuthnott v Fagan [1995] CLC 1396, that “[c]ourts will never construe words in a vacuum”. Page 8*

*21. Of course, a contract is agreed between a number of parties, whereas a will is made by a single party. However, that distinction is an unconvincing reason for adopting a different approach in principle to interpretation of wills: it is merely one of the contextual circumstances which has to be borne in mind when interpreting the document concerned. Thus, the court takes the same approach to interpretation of unilateral notices as it takes to interpretation of contracts – see Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749, per Lord Steyn at 770C-771D, and Lord Hoffmann at 779H780F.*

Lord Neuberger suggested that it might have been possible to construe the will executed by the husband so as to give effect to his intention. He preferred, however, to decide the case on the basis of rectification saying: *“ 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.”* He concluded that statutory rectification was available even if the document unrectified did not fulfil the requirements of a valid will: *“It does not appear to me that a document has to satisfy the formal requirements of s.9, or of having the testators knowledge and approval, before it can be treated as a “will” which is capable of being rectified pursuant to section 20.”*

There is, of course, additional statutory provision relating to the construction of will as set out in Section 21 of the Administration of Justice Act 1982 which modify the Marley principles so as to allow evidence of the testator’s subjective intentions in limited circumstances as below:

*(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.*

Since **Marley v Rawlings** there have been numerous cases where the principles of construction set out have been approved and applied. In none of them have the facts been as extreme as in Marley. The court has shown a preference for trying first to construe the will so as to give effect to the intention of the testator before looking at rectification but what can be deduced from the cases is that if there is an ambiguity the court will usually proceed down the construction route but where the will is sensible and clear on its face (as in Marley itself) but does not reflect intention then the court will consider rectification.

In the last year or so there have been a number of interesting cases on this area and it is some of those cases which I am going to talk to you about today. In the 15 minutes allotted to me I cannot possibly deal with all the cases dealt with below and so this paper will give you some information on the others.

**Margaret Burns as executor of** **Daisy Bean deceased v Karen Bean and others** [2021] EWHC 838 (Ch). This is a decision of Master Clark. The result of the expansion of the jurisdiction and the effective upgrading of Chancery Masters is that the Masters hear many more trials and they are much more widely reported. This case involved an issue which is relatively common but one if put to a layman would likely produce a totally opposite result. Clause 6 of Daisy Bean’s last will provided as follows: ***“My Trustees shall then distribute the balance remaining [which I shall call my residuary estate”] equally among all of my children who are alive at my death”.***

Mrs Bean had four children but one, George, had died before her but after the making of the will. George had 5 children of whom some were minors and were represented by the first Defendant, and adult child of the deceased child.

The question was whether the residuary estate was to be divided between the three children of Mrs Bean who survived her or between the three surviving children plus George’s children in substitution for George.

This is not just a simple question of construction of the words used but of those words used in the context of section 33(2) of the Wills Act 1837. This provides as follows:

## ***Gifts to children or other issue who leave issue living at the testator’s death shall not lapse.***

*(1) Where—*

*(a) a will contains a devise or bequest to a child or remoter descendant of the testator; and*

*(b) the intended beneficiary dies before the testator, leaving issue; and*

*(c) issue of the intended beneficiary are living at the testator’s death,*

*then, unless a contrary intention appears by the will, the devise or bequest shall take effect as a devise or bequest to the issue living at the testator’s death.*

*(2) Where—*

*(a) a will contains a devise or bequest to a class of persons consisting of children or remoter descendants of the testator; and*

*(b) a member of the class dies before the testator, leaving issue; and*

*(c) issue of that member are living at the testator’s death,*

*then, unless a contrary intention appears by the will, the devise or bequest shall take effect as if the class included the issue of its deceased member living at the testator’s death.*

*(3) Issue shall take under this section through all degrees, according to their stock, in equal shares if more than one, any gift or share which their parent would have taken and so that  (subject to section 33A)no issue shall take whose parent is living at the testator’s death and so capable of taking.*

In the Burns case it was primarily section 33(2) which could apply. The question for the Master was whether the words used in the Will evidenced a contrary intention.

Master Clark set out the principles of construction as set out in Marley and the provisions of section 21 of the Administration of Justice Act 1982. She went on to review three decisions in relation to the issue. The first was **Ling v Ling** [2002] WTLR 553 where the will provided *“If my said Wife shall die in my lifetime or shall fail to survive me by the period aforesaid, the Bank shall sand possessed of my residuary estate UPON TRUST for all or any of my children living at my death or at the expiry of one calendar month therefrom who attain or shall have then attained the age of twenty one years and if more than one then as tenants in common in equal shares absolutely.”*

Etherton J held at [27] that the words “living at my death” achieved nothing and were only there to state expressly what would otherwise be implicit, namely that a class is normally composed of those members, if any, existing at the date of death of the Testator. They gave, he held, no indication of any intention that a child’s issue should be excluded from taking the child’s share under s.33(2)

The second case was **Rainbird v Smith** [2012] EWHC 4276 (Ch) where the relevant clause provided: *“I give my estate (including any property over which I may have a general power of appointment or disposition by Will) to my Trustees Upon Trust…..*

*(c) subject thereto hold the residue remaining and the income thereof (“my Residuary Estate”) UPON TRUST for such of them my Daughters, the said JACQUELINE ANNE RAINBIRD JANET JONES… and GWENDOLINE SMITH …. as shall survive me and if more than one in equal shares absolutely”.*

This was an unopposed claim for rectification but the Judge, John Baldwin, sitting as a Deputy judge) decided that it was necessary to construe the will before considering whether to rectify it. The Judge took the view that the testator’s intention was perfectly clear and that was to leave her estate only to those of her daughters who actually survived her. He also considered that the expression “if more than one in equal shares” showed an intention that if one daughter predeceased the Testator, the shares of the others would be correspondingly increased. He distinguished Ling on the ground that in that case the Judge had commented that the will was very poorly drafted, awkward and grammatically inept.

Master Clark thought the distinction drawn between **Ling** and **Rainbird** was unconvincing and did not engage with the reasoning in **Ling** which was equally applicable to the will in **Rainbird**.

The third case was **Hives v Machin** [2017] EWHC 1414 (Ch). In that case the relevant clause of the will was as follows:

*Clause 5: “I GIVE DEVISE AND BEQUEATH all my remaining property both real and personal of whatsoever nature and wheresoever situate (including any property over which I may have a general power of appointment) not otherwise disposed of by this my Will to my Trustees …..UPON TRUST for such of my son PETER DAVID MACHIN my said son ERIC WILHELM MACHIN and my said son CHRISTOPHER BASTUBBE who shall be living at the date of my death and if more than one in equal shares absolutely”.*

The Judge, Mr Timothy Fancourt QC (as he then was) rejected a submission that his only task was to construe in accordance with the principles set out in Marley. He identified the proper question as being whether the will showed a contrary intention for the purposes of section 33(2). He came to the conclusion that *“The words of clause 5 should therefore be given their natural meaning, but neither they nor other terms of the Will show any contrary intention for the purpose of section 33.”.* He said he was reinforced in his view by the fact that Etherton J came to the same conclusion in Ling.

Master Clark came to the conclusion that clause 6 of the Will was not ambiguous. Its clear meaning is that Mrs Bean’s estate should be shared equally by all the children who survived her. That was the same conclusion as reached in **Rainbird** and **Hives v Machin**. As a result of that evidence of subjective intention was not permissible. That was not the end of the matter as the Court still needed to consider whether the words used evidenced a contrary intention under section 33. Master Clark considered whether there was admissible evidence under the Armchair principle or as part of the admissible factual matrix on this issue She looked at the provisions of Mrs Bean’s earlier wills. She applied the reasoning set out in **Ling** and in **Hives v Machin** and rejected that set out in **Rainbird** and came to the conclusion that the will of Mrs Bean including the words of clause 6 did not evidence any contrary intention.

**Partington v Rossiter** **[2021] EWCA Civ 1564 [2022] 2 WLR 37**

In this case the testator’s will stated that it only had effect in relation to his UK Assets. At the date of his death the Testator had substantial assets in Jersey. The executor brought a claim for a declaration that “UK assets” meant assets in the UK and the Channel Island” the Judge at first instance granted the declaration and the widow who was the Defendant appealed.

The appeal was dismissed. Despite the dictionary and statutory definitions of the “United Kingdom” excluding the Channel Islands the phrase United Kingdom as used in a private instrument was capable of including the Channel Islands but whether it did so in the particular instrument would depend on the interpretation of the instrument in question. The Court strives to give effect to the testator’s intention and purpose as expressed in a will. The court tries to construe so as to avoid an intestacy or partial intestacy. The surrounding circumstances within the meaning of section 21(1)(c) of the Administration of Justice Act 1982 included anything which might be relevant to the way in which a reasonable reader would understand a Will save for evidence of subjective intention and would include the nature and location of assets at the date of the will and (possibly) at the date of death. In this case there were two possible interpretations being an inclusive and an exclusive interpretation. It was unlikely that the deceased had intended to die partially intestate. Per LJ Lewison [29] *“It has long been a principle of interpretation of contracts that if one realistic interpretation would result in the contract being invalid and another realistic interpretation would result in it being valid, the Court would prefer the latter. That principle finds its parallel in relation to wills, in that the court will try to interpret a will so as to avoid intestacy, either in whole or in part.”* The will was ambiguous in the light of the surrounding circumstances. As a result evidence of subjective intention was admissible pursuant to section 21(2) and on that evidence it was clear beyond doubt that the testator intended references to United Kingdom to include Jersey and so where the abbreviation UK was used it included Jersey.

This case shows that language which appears clear and unambiguous on its face may when considered in the light of the surrounding circumstances be in fact ambiguous and in that case extrinsic evidence of subjective intention will be admissible.

**Royal Commonwealth Society for the Blind v Beasant and another** [2021] EWHC 2315 (Ch)

This case concerned the proper construction of a nil rate band gift. The estate was worth £3,127,174 before payment of IHT. The Claimant was one of 21 residuary beneficiaries all of which were described in the will as charities but of which one was in fact not a charity.

This is a decision of Master Shuman.

She stated that the principles re interpretation of Wills are as set out in **Marley**. She also referred to the most recent iteration of the Supreme Court on the interpretation of contracts in **Wood v Capita Insurance Services** [2017] UKSC 24.

The relevant clause in this will was as follows:

*“4. I GIVE the Nil-Rate Sum to my Trustees on trust for my said friend John Wayland Beasant.*

*4.1 In this clause “the Nil-Rate Sum” means the largest sum of cash which could be given on the trusts of this clause without any inheritance tax becoming due in respect of the transfer of the value of my estate which I am deemed to make immediately before my death.”*

It was significant that the gifts which followed were expressed to be free of Inheritance tax and were gifts of real property valued at £240,000 and shares. Clause 8 provided for pecuniary legacies again expressed to be free of tax totalling £45,000 and the residue was given to 21 bodies of which 20 were charities and so exempt from IHT.

The issue was whether on a true construction the gift in clause 4 was a gift of £325,000 or was a gift of what was left of the nil rate band having taken account of the effect of the value of the other gifts given free from tax or where IHT is charged at the nil rate. The claimant contended for the former which would result in Mr Beasant receiving nothing.

This case was very similar to that of **RSPCA v Sharp** [2010] EWCA Civ 1474. The Defendant argued that the will should be construed omitting clause 4.1 and if that did not find favour pointed out that clause 4.1 did not mention the other nil rate gifts in the Will.

The Master concluded that if the testator has wanted to make a gift of £325,000 to the beneficiary she could easily have done so. She did not. Equally it could have been worded as a gift of a sum free from tax, albeit the tax would have to be borne somewhere. The clause demonstrated an understanding of how IHT is chargeable. She did not accept that the words used in clause 4.1 where superfluous or otiose and found for the Claimant.

**Donald Keith Eade v Rowland Anthony Rymer Hogg and others including Cancer Research UK** [2021] EWHC 1057 (Ch)

This was a claim put at its simplest as stated by Deputy Master Linwood “to rectify or construe a will by replacing the word “both” with “each”.

The claim related to clause 2(b) of the will of Mr Nodes. It provided as follows:

*(b) during the life of my said wife PATRICIA ANN NODES my Trustees shall have the power to appoint to either or both of my said wife PATRICIA ANN NODES and/or my co director DONALD KEITH EADE up to such number of my personal holding of shares as shall when added to the existing shareholding of both of them amount to 26% of the issued share capital as at the date of my death.” Subject to that gift the shares were to be held upon trust to pay the income to Nicholas Nodes and subject thereto to Cancer Research absolutely.*

The first issue was whether on a proper construction of clause 2(b) and in the light of extrinsic evidence claimed to be admissible under section 21 of the Administration of Justice Act 1982 the clause permits the trustees to appoint to Mrs Nodes and Mr Eade so many shares as will bring each of their shareholdings up to 26% of the issued share capital or only so as to bring their combined shareholding up to 26%.

The second issue was whether further or alternatively the will should be rectified to substitute the word “each” for “both”.

The Deputy Master considered the factual background including the provisions of the testator’s previous wills, the relationship between Mr and Mrs Nodes, Mr Nodes health, a dispute with Mr Eade and the instructions for and making of the last will. Evidence of fact was heard which is quite unusual on an issue of construction.

There was common ground that the law in relation to construction of will is as set out in Marley and section 21 of the Administration of Justice Act 1982. There was, however, a dispute as to whether section 21 was engaged so as to allow the admission of extrinsic evidence of Mr Nodes intentions which assist in construing clause 2(b) of the Will. It was argued by Edward Hewitt on behalf of Cancer Research that the words were clear and not ambiguous. He said that the decisions in **Brooke v Purton** [2014] EWHC 547 (Ch) and **Reading v Reading** [2015] EWHC 946 (Ch) show that the approach in Marley results in a three stage test: First adoption of the approach at [19] of **Marley**, and dependent thereon

1. Consideration whether s.21 is engaged and if it is;
2. On consideration of any extrinsic evidence which is admitted by s.21 does that assist in construing the clause and does that construction differ from that at i.

The Judge looked at the factual matrix including the company dynamic and the previous will made by Mr Lodes. The Judge did conclude that in the light of the relevant circumstances etc the words used were ambiguous. The problem had been caused by a failure of the solicitor who took instructions for the Will to keep a contemporaneous note so as to ensure that the will reflected the true intentions. The word both could mean between two people or each depending on the circumstances. He used the example of a father who said to his two children “you both can have a chocolate bar”. In that case both implies two bars and the word is synonym of each. On the other hand if he says to his adult son and daughter-in-law “I will give you both a car” this implies one between them. He therefore found the will ambiguous on its face and in the light of the surrounding circumstances. As a result clause s.21(1)(c) is engaged and he was able to consider the direct extrinsic evidence and having considered that he came to the conclusion that the intention of Mr Nodes was that each of Mr Eade and Mrs Nodes were entitled to have shares which would bring each of their shareholdings up to 26% each.

**Jacqueline Da Silva v Sandra Heselton and others** [2021] EWHC 3079 (Ch)

A decision of David Rees QC sitting as a Deputy judge on appeal from a decision of Deputy Master Lloyd. This case involved the proper construction of a charging clause which was as follows: “*MY TRUSTEES shall have the following powers in addition to their powers under the general law or under any other provision of this Will or any codicil hereto………*

*(g) for any of my Trustees who shall be engaged in any profession or business to charge and be paid (in priority to all other dispositions herein) all usual professional and other fees and to retain any brokerage or commission for work business introduced transacted or time spent by him or his firm in connection with the administration of my estate or the trusts powers or provisions of this Will or any codicil hereto including work or business outside the ordinary course of his profession and work or business which he could or should have done personally had he not been in any profession or business.”*

Mrs Heselton was an executor and trustee of the trusts set out in the Will and was involved in a business which was unrelated to the administration of trusts or estates. The question which arose was whether she could rely upon the charging clause to charge for time spent on the administration of the estate.

It was common ground that the normal rule is that a trustee must act gratuitously and so the ability to charge, at least at the time of the events in question, was an exceptional right and a charging clause will be construed strictly.

Deputy Master Lloyd stated, inter alia, *“I accept entirely that the charging clause is not restricted to a Trustee who is pursuing a profession such as a solicitor or accountant but extends to a person engaged in business. But it does seem to me that the business has to have some relevance to the matter of administering estates and, more to the point, that the administration time spent, for which it is sought to charge should have been part and parcel of that business. It is trite law that a charging clause will be construed strictly.”*

The Deputy Master found that he was not satisfied that the activities in administering the Deceased’s estate were done in the course of Mrs Heselton’s business and so made the declaration sought by Mr Brunton (the replacement administrator and trustee) that Mrs Heselton was not entitled to charge for her time.

Mrs Heselton appealed. Mr O’Sullivan, Counsel for Mrs Heselton relied on a quotation from Lewin on Trusts (20th Edition para 20-016 which says: *“ A professional trustees charging clause in the usual form is not confined to solicitors. Under such a clause Trustees engaged in any profession or business are entitled to remuneration for their services, even though the profession or business does not pertain to trust administration at all.”* Mr O’Sullivan relied on that passage as authority for the general proposition that an executor engaged in a profession or business unconnected with estate administration can charge for their time spent on that task.

David Rees QC disagreed. He agreed that the principles of interpretation in relation to Wills were as set out in **Marley v Rawlings**. He stated that as charging clauses should be restrictively construed anything not falling clearly within it should be treated as falling outside it. He went on to say that where a person seeking to rely on the charging clause was not responsible for its terms the was no reason why they should not be entitled to have it fairly construed according to the natural meaning of the words used. He then went on to look at the specific words used in the Will. The clause applied to a person engaged in a profession or business and he accepted that they were potentially capable of applying to a person engaged in any profession or business, even if the scope of that profession or business has no connection with the administration of estates. He stated: *“However, the ability of a person engaged in such a profession or business to charge under this clause is not unconstrained. They may only charge “all usual professional and other fees”. And those usual fees must be for work or business….. done or time spent by him in connection with the administration of the estate.”*

David Rees QC considered that it was the inclusion of the words *“usual professional and other fees”* which was key to the meaning of the clause. He considered that those words governed not only the amount of fee which could be charge but also the nature of the work for which a fee could be charged. He went on to say that the natural meaning of the words used in the Will require one to look at the work or business done, and consider whether in the profession or business of the trustee in question a “usual professional or other fee” would be chargeable. As a result *“a trustee whose profession or business does not involve the management or administration of a trust or estate may charge for work carried out in relation to a trust or estate, but only if a charge for the particular work or business done would arise in the usual scope of their profession or business.”* This is in contra distinction to a trustee such as a solicitor, whose profession or business does involve the administration of trusts or estates who can charge for all work done in relation to the trust or estate.

David Rees QC relied on the decision of Buckley J in **Clarkson v Robinson** 1900 Ch 722. In that case Buckley J said the trustee must show that the work was caried out in the course of their profession or business albeit not necessarily in the ordinary course of that business.

If this was not the case a trustee could set up a shell business in order to be able to charge for time caried out in the trust administration. Alternatively for example if the principle were not as David Rees set out a hairdresser running his or her business would be entitled to charge for work done in relation to the trust administration even though the work ad absolutely no connection with his business and for which he would not be able to charge in the context of that business.

**Equiom (Isle of Man) Limited and others v Velarde and others** [2022] EWHC 11 (Ch)

This is a decision of Mr Ashley Greenbank sitting as a Judge of the High Court on appeal from the decision of Deputy Master Dray. The Deputy Master held that a provision of the Will of Mrs Patricia Moores had the effect of revoking a previous exercise of a power of appointment by Mrs Moores in relation to property under a settlement created by her father Cecil Moores, in 1949.

Mrs Moores executed several revocable appointments of assets contained in the 1949 settlement in favour of her three children or a combination of them. In 1997 Mrs Moores revoked an appointment made in a deed of appointment in 1981 and instead appointed what was referred to as the Patricia Trust fund from and after her death on trust for two of her children, Christian and Rebecca and excluding the third child, Matthew. At the time of the 1997 Deed of Appointment Matthew was going through a divorce which probably explains why he was then cut out.

Mrs Moores made various wills and codicils over the years leaving her estate to her children in various proportions or cutting one or other out. In 2007 she made her last will of which clause 7 provided as follows:

*“I LEAVE DEVISE AND BEQUEATH AND APPOINT the whole of my real estate and the rest residue and remainder of my personal estate wheresoever situate and of whatsoever kind of or to which I shall be seised possessed or entitled at the ate of my death or over which I shall have any power of testamentary disposition whatsoever…. Unto my children, PETER CHRISTIAN VELARDE, MATTHEW JULIAN VELARDE AND REBECCA VELARDE”.*

The question in the proceedings was whether clause 7 of the Will operated so as to revoke the 1997 Deed of Appointment and make a new appointment giving Matthew and equal share in the Patricia Trust Fund with Christian and Rebecca.

Deputy Master Dray decided that, as a matter of construction of the terms of the 2007 will Mrs Moore’s intention was to revoke the 1997 appointment and make a new appointment in favour of the three children.

He decided that the terms of the 2007 Will were ambiguous in the light of all the surrounding circumstances and that by reason of section 19 of the Isle of Man Wills Act 1985 which is in the same from as section 21 of the Administration of Justice Act1982 he was entitled to consider extrinsic evidence and having done so he found, that so far as it helped at all, it supported his finding in relation to intention.

It was clear that the 1997 appointment could be revoked by Will or codicil. The Deputy Master took into account that when she executed her 2007 Will Mrs Moores was aware of the 1949 Settlement and her powers of revocation and appointment under it. She had no other similar powers vested in her. The reference to Appointment in clause 7 and to any property over which she had any power of testamentary disposition whatever evidence an intention to exercise a power of appointment. That intention would not be given any effect without the associated revocation of the 1997 Deed of Appointment.

Notwithstanding this clear conclusion the Deputy Master considered the words of clause 7 were ambiguous entitling him to look at extrinsic evidence, in effect to check his reasoning.

Christian appealed the decision and Penelope Reed QC acted for him both before the Deputy Master and on appeal.

The main bone of contention appears to have been over the Deputy Master’s finding that if a testamentary gift framed in a particular way would fail unless construed as entailing the exercise of a power of revocation (so as to bring within the ambit of the will the property which is the subject matter of the power) the instrument will be take as the exercise of the power.

The Deputy Master described what he saw as a general trend apparent from the authorities against a conclusion which would render aspects of a Will redundant.

It was accepted that in order for there to be a revocation and intention to revoke must be shown. The easiest way to show such an intention is to use express words of revocation but in this case there were none. This does not mean that there was no revocation.

The Deputy Judge on appeal did not agree with the breadth of the principle which the Deputy Master arrived at and said that the authorities *“support a more limited proposition, namely that a revocation will be implied if the words used in the Will, viewed in context , demonstrate an intention on the part of the testator or testatrix to make a gift or to exercise a power of appointment which can only take place if a prior appointment is revoked.”* As set out in the earlier cases of **Pomfret v Perring** 43 ER 1071**, In re Brace** [1891] 2 Ch 671 **and In re Thursby’s Settlement** [1910] 2 Ch 181 a revocation should only be implied if it is necessary to do so to give effect to the clear intention of the testator or testatrix.

The Judge in **Pomfret v Perring** stated that if a testator has more than one power of appointment then a revocation cannot be implied from general words of revocation in the instrument . In cases where the testator has only one power of appointment, as in this case, general words of appointment will be sufficient to imply a revocation of the prior appointment and the exercise of a power to make a new appointment. Those comments were, however, obiter and the Deputy Judge concluded that it was not always the case in one power cases that general words would be regarded as involving the necessary implication of a revocation and the exercise of the power to make a new appointment. The better view is that the question depends on the words used and their context.

As a result the Deputy Judge considered it was necessary to determine whether the general words reflect a testamentary intention to make the gift in question. That could only be judged by viewing the words in the context of the circumstances of the case. In some cases a residuary gift would be simply that with sweeping up provisions to cover assets not otherwise dealt with by a will or a prior appointment with no intention to displace previously made appointments

Having considered the grounds of appeal against the surrounding circumstances the Deputy Judge dismissed the appeal.

Helen Galley

XXIV Old Buildings

11 May 2022