Common sense or a slippery slope?

Alison Regan analyses the implications of the Supreme Court decision in Marley v Rawlings

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'Lord Neuberger stated that Mr Rawlings had signed a document which he believed to be his will in the presence of two witnesses and that he had to be the testator as he had signed the will.'

On 22 January 2014 the Supreme Court unanimously ruled that a couple's intended heir should not be disinherited despite the husband and wife mistakenly signing each other's will. Lord Neuberger delivered the judgment which determined that the will erroneously signed by Mr Rawlings could be admitted to probate.

This is an important decision in the area of rectification and validity of wills, and at first blush it does seem like a common sense decision. However one does wonder if this will lead to some uncertainty and further litigation.

Facts

Mr and Mrs Rawlings executed their mirror wills in 1999. They had instructed their solicitor to draft mirror wills: to leave all their assets to each other and then on the second death to Mr Marley. Mr Marley was not related to the Rawlings, but was treated by them as a son. The Rawlings did have their own two sons, but they were not intended to inherit. This was all clear.

Unfortunately due to an error on the part of their solicitor (which he fully admitted) they each signed the will intended for the other.

Mrs Rawlings died in 2003 and the mistake was not noticed. However, when Mr Rawlings died in 2006 his sons challenged the validity of his will (ie the will he had actually signed, 'the will'). If the will was invalid then the two sons would inherit on intestacy and Mr Marley would get nothing.

Mr Marley made an application to rectify the will. If this did not succeed, then Mr Marley had a strong professional negligence claim against his solicitor.

High Court

Proudman J found that the will did not comply with s9(b) of the Wills Act 1837, which stated 'no will shall be valid unless – (b) it appears that the testator intended by his signature to give effect to the will'. The reasoning was that Mr Rawlings did not intend to give effect to the will he signed because, had he known it was not his, he would not have signed it at all. That seems fairly straightforward and obvious.

It was also held that even if wrong on the s9 point, and the will was valid, it could not be rectified pursuant to s20 of the Administration of Justice Act 1982 (AJA 1982). Section 20 states:

> (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.

It was held that there was no clerical error here. Proudman J said that even though the definition of a 'clerical error' was wide, in her view, it could not extend beyond amending the actual wording in a will, ie an error in drafting. The claim failed.

Court of Appeal

Mr Marley appealed. His counsel referred to the changes that had been brought about by the AJA 1982 which amended s9 of the Wills Act and

relaxed the formal requirements; it now only being a requirement that the testamentary document is in writing and signed in such a way that it is apparent that the testator intended by their signature to give effect to the document as a will.

Mr Marley argued that the signature by Mr Rawlings was an act of execution and that extrinsic evidence of the contents of Mrs Rawlings' will could be admitted to determine what Mr Rawlings intended. It was said that these elements together were enough to comply with the formalities.

The sons argued that the will had to fail because of the execution defect and the fact that it did not as a result comply with s9(b) of the Wills Act. If there was no valid will at all, there was nothing to admit to probate and nothing to rectify.

The sons' counsel also made the point that the AJA 1982 specifically envisaged a signature at the end of a will, and if Parliament had intended a will to stand notwithstanding the absence of that signature, it would have made provision for this in the Act.

The sons also argued that the will failed because Mr Rawlings did not have knowledge and approval of its contents. They did not think that the fact that the extrinsic evidence related to Mr Rawling's wife's will should make any difference. They argued that the relationship was irrelevant and that, if a will in this case was admitted to probate, that would mean that a 'testator' could mistakenly sign a stranger's will, and that will would still then be admitted to probate.

They also argued that even if the will did not fail, the error was not clerical in that there was no issue with the wording in the will, consequently rectification was not available.

Black LJ delivered the judgment and began with the question as to whether the will in question was in fact valid or not, s20 AJA, in her judgement, only being capable of being applied to a valid will.

Section 9(a) required that the will be signed by the testator. Black LJ concluded that the testator of the will in question could only be Mrs, not Mr, Rawlings.

> ... the document he signed was not the one he meant to sign at all and cannot therefore be his will.

The Supreme Court

Mr Marley appealed on a number of bases:

Interpretation

Lord Neuberger considered the law in relation to wills, and concluded that the approach should be the same as was applied to the interpretation of commercial contracts, namely the need to look at the actual words themselves in light of their context and the purpose of the document, ignoring any subjective evidence of intention, ie the court 'putting itself in the testator's arm-chair'.

He also referred to s21 of the AJA which, in the case of wills specifically, referred to the possibility of introducing extrinsic evidence where there was some ambiguity and where that evidence could assist in interpretation.

Mr Marley argued that that Mrs Rawlings' will could be read with the will. They were executed on the same day and each could assist in the interpretation of the other. He concluded therefore that the will could be interpreted and stand accordingly.

Lord Neuberger set out the distinction between interpretation and rectification, ie that the former

The sons also argued that the will failed because Mr Rawlings did not have knowledge and approval of its contents.

She stated that even if the testator could be construed as Mr Rawlings, he did not by his signature intend to give effect to this specific will and so s9(b) was not satisfied either.

Black LJ distinguished this case from those where a will may contain errors. She said:

> ... one situation involves the testator's will but with errors in it and the other does not involve his will at all.

Her view was that this was simply not Mr Rawlings' will.

There was some lengthy consideration given to international authorities, most of which acknowledged that the issue of transposed wills was not easy to resolve. Ultimately Black LJ agreed with the 'conservative/traditional' approach saying that, however close to the testator's intentions the contents of the will in question may be:

would mean that the will always had the meaning determined by the court whereas the latter meant that the will would have a meaning given to it, ie not a meaning that necessarily appeared on it face.

Ultimately their point was left unresolved as the dispute was decided on the point of rectification.

Deletions

An alternative argument was that the will was valid in that Mr Rawlings had knowledge and approval of it, subject to deletions. Counsel for Mr Marley argued that specific clauses could be deleted, leaving a will recording that Mr Rawlings revoked his previous wills and had left his entire estate to Mr Marley.

Lord Neuberger concluded it would be quite inappropriate to delete clauses to suit what coincidentally was Mr Rawling's intention.

Rectification

This was the principal argument and the one that ultimately was successful.

Rectification is intended to be a method of correcting a document which does not accurately reflect an agreement or intention and s20 of the AJA clearly set down parameters within which rectification can be applied. The sons argued that to import Mrs Rawling's will wholesale was to take s20 too far. Lord Neuberger disagreed. He saw no reason to rule out such a correction.

As he said:

> ... the greater the extent of the correction sought, the steeper the task for a claimant who is seeking rectification.

He was happy that Mr Rawlings' intention was clear and there was no reason not to import the whole of Mrs Rawlings' will.

The sons argued that the will was not in any event a will capable of being rectified. Lord Neuberger stated that s9 was concerned with formalities and that, if they are complied with a will is in existence, even if ultimately it has no effect because the testator did not have knowledge and approval of its contents.

Similarly he stated that even if s9(a) and (b) had not been complied with, this would not prevent a claim for rectification. He disagreed with Black LJ for the following reasons:

- There was no reason to limit the operation of s20 and that rectification could convert an invalid will into a valid will;
- Rectification was already permitted in converting ineffective contracts into enforceable contracts in the context of land contracts.
- It made sense to deal with validity and rectification together.
- Historically there had been no objection to treating a document as a will even though it had turned out to be invalid.
- The wording of s20 envisages documents that are purporting to be wills as opposed to exclusively applying to those wills that already comply with s9.

Lord Neuberger also stated that rectification of other documents was not limited to clerical error and it was hard to see why there should be a different rule for wills.

In any event Lord Neuberger concluded that s9(a) and (b) were complied with. He stated that Mr Rawlings had signed a document which he believed to be his will in the presence of two witnesses and that he had to be the testator as he had signed the will (notwithstanding the opening words expressing the will to be that of Mrs Rawlings). Consequently s9(a) had been complied with.

He went on to say that Mr Rawlings' intention was that the will he signed should have effect and that s9(b) therefore had been complied with.

Finally the sons argued that this sort of error was not the sort of 'clerical error' envisaged by s20(1a). Lord Neuberger referred to the case of *Bell v Georgiou* [2002] in which Blackburne J referred to words being omitted or included in error and the remedy being available if the will fails to carry out the testator's instructions and that it is clear what those instructions are.

Lord Neuberger made the point that it was hard to see why there should be a different outcome if a clause instead of a word was mistakenly omitted. Therefore in principle where does one draw the line and why should wholesale replacement be excluded as a possibility? Lord Neuberger was of the view that there should be a wide interpretation of 'clerical error'.

He also stated that rectification of other documents was not limited to clerical error and it was hard to see why there should be a different rule for wills.

Finally he referred to the AJA and how s17 to s21 were enacted with the specific purpose of relaxing the formalities and introducing greater flexibility. The example was given where B's will is signed by A as opposed to where the content of B's will is cut and paste into A's will and then signed by A. How could the latter be a clerical error capable of giving rise to a rectification application, but the former not?

He therefore concluded that the will could be rectified so as to include the parts of the will signed by Mrs Rawlings.

Conclusion for practitioners

A flexible approach may at first glance be an admirable approach, but there is a real danger that this decision will lead to further litigation as the concept of 'clerical error' has been widened. It also seems that a lot of weight has been put on the subjective intentions of the testator and rather less weight on the strict formalities which are after all in place to ensure clarity and to prevent fraud. Finally it is rather confusing that a document can be described as the will of the testator (for the purpose of rectification) even though it is accepted that the testator does not have knowledge and approval of the contents of that document. That seems like a slippery slope. ■

Bell v Georgiou
[2002] WTLR 1105
Marley v Rawlings
[2014] WTLR 299;
[2012] WTLR 639 (CA)
[2011] WTLR 595 (Ch D);