IN THE HIGH COURT OF JUSTICE **Claim No: HC12EO4418**
CHANCERY DIVISION **Neutral Citation no. [2014] EWHC 547 (Ch)**

IN THE ESTATE OF STEVEN JAMES ANDREW HUNTLEY DECEASED
AND IN THE MATTER OF THE ADMINISTRATION OF JUSTICE ACT 1982

BETWEEN:

1) MICHAEL BROOKE
(2) ARTHUR JENNINGS
(3) IAN CAMPBELL

Claimants

-and-

(1) LOUISE PURTON
(2) ZOE HUNTLEY
(3) JAMIE HUNTLEY
(4) LEE HUNTLEY
(5) JAKE HUNTLEY (a minor by his litigation friend RICHARD PURTON)
(6) ALFIE HUNTLEY (a minor by his litigation friend RICHARD PURTON)

Defendants

Before:
David Donaldson Q.C. sitting as a Deputy High Court Judge

26th March 2014

1. This action concerns a will which went seriously wrong in the drafting. The court is asked to put it right by construction and/or rectification. The application is made by the executors of the will and trustees of a trust arising under the will, probate of which was granted on 29 November 2011 following the death of the testator in a motorcycle accident on 11 March 2011 at the age of 47. At the time of his death the testator was living with the First Defendant and their two young children, who are the Fifth and Sixth Defendants. The Second Defendant is an adult daughter of the deceased by his ex-wife, and the Third and Fourth Defendants are his adult children by a former partner. All were represented before me by Counsel[1], though on the point with which this judgment is concerned[2] they broadly supported the revision sought by the trustees. The net estate is estimated at around £6.9 million, of which the principal component - valued at around £5.4 million - is a 90% shareholding in Swift Group of Companies Ltd ("Swift"), an unquoted company, with the balance being real property, a collection of vintage cars and motor-cycles, and cash. The position was little different at the date of the will, about a year before the death.

[1] Under an order dated 8 April 2013 these defendants also represent spouses, future spouses, issue and their spouses and future spouses.

[2] A further point relating to a letter of wishes turned out at the hearing to require no adjudication by the court.

2. In early 2009 the deceased ("Mr Huntley") sought advice from Horsey Lightly on wills and inheritance tax planning. On 19 February 2009 he met with Ms Amanda Greenough, then 2 years post-qualification and employed in the Private Client Department. He described his familial situation and detailed his various assets and their values. At that meeting and later in a letter dated 26 February 2009 she explained that his commercial assets would benefit from business property relief under which unquoted shares would attract 100% relief against IHT, while any land held for the purpose of a business would benefit from a 50% rate. She explained that the estate would also have a nil rate band (then of £312,000 but increased to £325,000 from April 2009), with any excess taxable at 40%. In response to Mr Huntley's enquiry whether IHT could be further mitigated, she advised that this could most simply be done by marrying the First Defendant and using the exemption on assets passed to a spouse. Mr Huntley was nervous about such a course, because of the financial implications if it came to a divorce, and Ms Greenough advised that he should consult another member of her firm, Lynn Wallis, for advice on these questions.

3. The question of a discretionary will trust arose in the following way described in Ms Greenough's letter:

> *"You expressed concern to ensure that your five children would be equally looked after with Louise, i.e. in an ideal world the estate should be divided six ways. We discussed arranging a Discretionary Trust of your estate whereby it would be for the trustees to decide how much and when the beneficiaries would receive their inheritance. You demonstrated concern over your children in the fact you felt they would not be capable of managing a large inheritance. Therefore, a discretionary trust would solve this problem as it would be down to the trustees to decide what age they would inherit. You can offer guidance to your trustees in the form of a Letter of Wishes which I will assist you with drafting when we decide to proceed with your will."*

4. On 4 March 2009 Mr Huntley met with Ms Greenough and Lynn Wallis. Having heard the latter's advice, and being unwilling to risk the loss of half his capital if matters subsequently came to a divorce, Mr Huntley intimated that he did not propose to marry the First Defendant.

5. On 17 March 2009 Ms Greenough wrote to Mr Huntley enclosing a draft will and a will summary. The letter included the following passage:

> "**Nil Rate Band Discretionary Trust**
>
> *"Within your will I have included a nil rate band discretionary trust. This is a most flexible type of trust and we have written it in such a way whereby any*

gift of your business will be paid into the settlement at the reduced valuation, i.e. after deducting the business property relief. This also ensures that any business assets that you have pass to your trustees to deal with and together with the additional powers will enable them to continue the business without having to distribute the business assets to the beneficiaries."

In relation to Clause 6, dealing with the trust, the will summary stated:

> ***"6 Discretionary Trust***
>
> – *First assets to enter the trust are those applicable to business property relief (or agricultural property relief) to inheritance tax. For example, your business interest under Swift Company, any unquoted shares you may have, etc.*
>
> – *The value of these business/agricultural assets is then reduced (either by 50%, or 100%, depending upon the asset), giving the "reduced value".*
>
> – *If there is a shortfall between the "reduced value" and the inheritance tax ceiling (£312,000 for 08/09) this can be made up of other assets such as cash, etc.*
>
> *..."*

6. The letter evoked no response, even after a chaser on 29 September 2009, until on 19 March 2010 Mr Huntley arrived at Horsey Lightly to execute his will. Ms Greenough went through the draft will explaining the purpose of each clause and the role of the letter of wishes in connection with the NRB discretionary trust, the proposed contents of which were discussed. She repeated that the business (i.e. the Swift shares) would attract 100% BPR and the commercial property let for business 50%[3], adding that *"if there is any unused nil rate band available then this would be made up from other assets held within* [the] *estate".* Mr Huntley indicated that he would wish the difference to be made up by cash held in his personal account. A Memorandum of Wishes was subsequently prepared on the basis of this discussion and signed on 2 June 2010.

7. With that background I turn to the contents of the will which Mr Huntley executed at that meeting on 19 March 2010.

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[3] I was told that the latter advice was incorrect, but it nonetheless would have represented Mr Huntley's belief at the time of executing the will.

8. (a) In Clause 4 he gifted his personal chattels to his trustees as beneficial legatees (i.e. outside the discretionary trust) - these would have included the collection of cars and motor-cycles worth in the region of £100,000+. In Clause 5 he gave to the First Defendant his interest in a residential property which he owned jointly with her, that interest being worth at the date of death a year after the will £354,593. In addition there was a villa in Portugal worth (at 2011) some £269,000, which though passing under a separate Portuguese will would also have attracted UK IHT (though I was given to understand that under double-taxation arrangements credit would have been given by HMRC for any tax paid in Portugal).

(b) Clause 6 of the will set up the discretionary trust and its proposed contents. It is this clause (or parts of it) that it is sought to revise by construction and/or rectification, and I set it out so far as material in the next paragraph.

(c) Clause 8 provided that the remainder of the estate should be paid to the First Defendant and his children (or further issue) in equal shares. This would give rise to further chargeable transfers.

9. The relevant parts of Clause 6 are as follows:

> *"6.1.1 "Reduced Value" means the value of the property after reduction in accordance with the Inheritance Tax Act 1984 Section 104 or as the case may be Section 116* [viz. the Business Property Relief of 100% or 50%]
>
> ...
>
> *6.1.3 "The Nil Rate Sum" means a sum equal to the amount which is the upper limit at the date of my death of the first band of value ('the nil rate band') shown in the Table referred to in the Inheritance Tax Act 1984 Section 7 (or any modification or re-enactment of it) which applies to determine rates of tax on death* [£325,000 since 2009, £312,000 at the date of the will] *less the total of:*
>
> *6.1.3.1 such part of the value transferred in respect of my estate as is attributable to property (other than the legacy given by this clause) with respect to which the transfer of value on my death is chargeable as opposed to exempt and*
>
> *6.1.3.2 the value transferred by chargeable transfers made by me within the period of 7 years immediately preceding my death (including potentially exempt transfers which become chargeable transfers)*

...

6.2 I give to my Trustees on the trusts set out in 6.3 such items of relevant business property and agricultural property comprised in my free estate (including a divided or undivided share or a part or parcel of any such property) as my Trustees in their absolute discretion shall select and as have an aggregate Reduced Value not exceeding the Nil Rate Sum.

6.2.1 If all my relevant business property and agricultural property has an aggregate Reduced Value of less than the Nil Rate Sum then I give all my relevant business property and agricultural property to my Trustees on the trusts set out in 6.3 and in addition

6.2.2 I give to my Trustees on the trusts set out in 6.3 such sum as when added to the amount of the aggregate Reduced Value of my relevant business property and agricultural property equals the Nil Rate Sum.

6.2.3 This gift shall bear its own inheritance tax if any."

10. When the relevant information was collated for tax purposes following the grant of probate it transpired that the chargeable transfers (i.e. after 100% relief on the business assets[4]) were in excess of £1.5 million. It is unlikely that the position at the date of the will (a year earlier) was materially different. Feeding this into Clause 6.1.3, and deducting it from the Nil Rate Band Rate of £325,000 (in place since April 2009) results in the Nil Rate Sum emerging as zero or, if possible, a negative figure. The same would have been true at the date of the will, when the band was £312,000.

[4] There were no assets which qualified for 50% relief.

11. This was of course at plain variance with what had been stated in the will summary accompanying the draft will (and repeated on 19 March 2010). Ms Greenough explained to the court how this had come about, namely by her use of a precedent from the firm's library stocked on its computer server, which she had adopted unchanged for the entirety of Clause 6[5] (save for the identification of the beneficiaries) without realising that it was inappropriate. Nil rate band discretionary trusts are generally deployed in conjunction with the spousal exemption, all or most of the excess over the top of the band being gifted to the surviving spouse, so that there are no or no significant gifts to erode the tax free allowance other than those made to the trust. The object is to pass as many assets as possible tax-free to a donee other than the spouse, commonly the testators' children. The precedent which Ms Greenough used for Clause 6 was addressed to this everyday situation (as indeed appears from the distinction made expressly in Clause 6.1.3.1 between chargeable and exempt transfers). In simply copying that precedent, she failed to appreciate that in the absence of a spouse and her exemption its wording was not only inappropriate but would frustrate what she intended to achieve.

Construction

12. The correct approach to the construction of a will has recently been addressed by the Supreme Court in *Marley v Rawlings* [2014] UKSC 2, where Lord Neuberger stated at [19] to [26]:

> "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.
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> 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

[5] And indeed as the basis for many other Clauses.

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 an acontextual 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".

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 779H-780F.

22. Another example of a unilateral document which is interpreted in the same way as a contract is a patent - see the approach adopted by Lord Diplock in *Catnic Components Ltd v Hill & Smith Ltd* [1982] RPC 183, 243, cited with approval, expanded, and applied in *Kirin-Amgen* at paras 27-32 by Lord Hoffmann. A notice and a patent are both documents intended by its originator to convey information, and so, too, is a will.

23. In my view, at least subject to any statutory provision to the contrary, the approach to the interpretation of contracts as set out in the cases discussed in para 19 above is therefore just as appropriate for wills as it is for other unilateral documents. This may well not be a particularly revolutionary conclusion in the light of the currently understood approach to the interpretation of wills (see eg Theobald on Wills, 17th edition, chapter 15 and the recent supplement supports such an approach as indicated in *RSPCA v Shoup* [2011] 1 WLR 980 at paras 22 and 31). Indeed, the well known suggestion of James LJ in *Boyes v Cook* (1880) 14 Ch D 53, 56, that, when interpreting a will, the court should "place [itself] in [the testator's] arm-chair", is consistent with the approach of interpretation by reference to the factual context.

24. However, there is now a highly relevant statutory provision relating to the interpretation of wills, namely section 21 of the 1982 Act ("section 21"). Section 21 is headed *"Interpretation of wills - general rules as to evidence"*, and is in the following terms:

"(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."

25. 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.

26. 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 (eg 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). "

13. Sitting metaphorically in the armchair of the testator and with his knowledge and belief as to the present and future nature and value of his various assets, it is apparent that a literal reading of Clause 6.1 and 6.2 could not plausibly represent his intentions. Given the likely size of his estate apart from the business assets such an interpretation would preclude the inclusion of any assets in the trust. It was submitted by one counsel that the injection of business assets with 100% relief would be possible on the basis that it would not lead to an increase beyond a Nil Rate Sum of zero, but this reasoning is in my judgment so contrived as to preclude imputing it to the testator. Moreover, even that interpretation would not cover the obvious purpose of constituting the trust as a nil rate band one, namely the ability - flagged clearly in Clause 6 itself - to accept other assets not enjoying such relief up to the current nil rate band.

14. Even on this limited material it is clear that something has gone seriously wrong, and how. Essentially, Clause 6.2.1 and 6.2.2 proceed on the basis that first of all business assets should be taken into the trust with the balance[6] being topped up with other assets, whereas Clause 6.1.3 begins with the deduction of the other assets to determine how much (if any) business property can be included. As between the two it is clear that the former must represent the true purpose of Clause 6: there could be no other reason for the inclusion of Clause 6.2.1 and 6.2.2.

15. On this basis I would conclude that Clause 6 is to be construed as if Clause 6.1.3.1 were omitted[7], producing a Nil Rate Sum equal to the statutory nil rate band (in the event £325,000). Business assets with 100% relief (in the event the Swift shares) therefore pass without limit to the trust together with a top-up with other assets[8] to the nil rate band ceiling.

16. I have reached this view without reference to section 21 of Administration of Justice Act, 1982 (set out in *Marley v Rawlings* [24] at paragraph 12 above). But its application would in my judgment go in reinforcement of that conclusion. This is a case where, after considering "armchair" evidence of matters known to or in the contemplation of the testator, one is left with uncertainty as to what was intended by the wording of the will. Though that might not be accepted as an ambiguity in linguistic philosophy or analysis, I can see no reason why the concept in section 21 should be so constrained. On the contrary, it is in my view both desirable and appropriate that the concept of ambiguity in Section 21 of the 1982 Act should be broadly interpreted. Section 21(1)(c) is therefore in my view both engaged and satisfied, opening the door to extrinsic evidence of intention. As I have indicated earlier, such evidence is both available and strong, and - as I am in no doubt - establishes the intention in the terms clearly recorded in the will summary.

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[6] The current 100% relief might of course be reduced, or some of the assets might be rated at 50%, so that the balance might be 100% of the band or some lesser figure.

[7] Arguably that should extend to Clause 6.1.3.2, but the point is academic since there were no chargeable transfers in the seven years preceding the death.

[8] Which could have included assets with 50% relief at their reduced value, if the estate had contained any (which it did not).

Rectification

17. The relevant law is now encompassed in section 20 of the 1982 Act as follows:

> *"20.- Rectification.*
> *(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."*

Although there may in theory exist a power under the general law to rectify a will, it is no longer appropriate to invoke it outside the parameters imposed by the statute (see *Marley v Rawlings* at [30]).

18. The words "clerical error" are to be given a wide meaning: *Marley v Rawlings* at [76]. While any gloss risks an unintended restriction on that width, I find assistance in the view expressed by Chadwick J in *Re Segelman* [1996] Ch 171 at 186 that

> "the jurisdiction conferred by section 20(1), through paragraph (a), extends to cases where the relevant provision in the will, by reason of which the will is so expressed that it fails to carry out the testator's intentions, has been introduced, or, as in the present case, has not been deleted, in circumstances in which the draftsman has not applied his mind to its significance or effect."

What occurred in the present case fits in my view comfortably within the concept of a "clerical error" as elaborated in that observation.

19. It would therefore be appropriate to rectify the contract to reflect the testator's intentions, which can be taken in the present case to be as stated in the will summary. This can be most economically achieved by the deletion of Clause 6.1.3.1. As I have already determined, however, upon its true (albeit liberal) construction the will already has this meaning, so that there is no need, nor indeed logical scope, for rectification. The power to make such an order nonetheless *ex abundanti cautela* is supported, if somewhat tenuously, by a decision of the Privy Council (see *Standard Portland Cement Co Pty Ltd v Good* [1982] 57 ALJR 151). To that may be added a more extensive Australian jurisprudence (reviewed in *Frankins Pty Ltd v Metcash Trading Ltd* [2009] NSWCA 407)[9], which has however not so far found any echo in English case

[9] Cf my observations in *Kevern v Ayres* [2014] EWHC 165 at [15].

law[10]. For my own part, I find it difficult to understand what an order for rectification can contribute in such a case[11], and do not intend myself to take that course here, whether or not it is theoretically open to me.

20. In these circumstances, it is not necessary to consider the application for extension of time under section 20(2) of the 1982 Act, under which the permission of the court is required for any application for rectification under section 20(1) of the 1982 Act made more than six months after representation in respect to the estate is first taken out[12]. I will however indicate shortly that, having regard to the factors I identified in *Chittock v Stevens* [2000] WTLR 634, I would have acceded to that request, if an order for rectification had been necessary. The six month period in this case expired on 29 May 2012. The application, included in the details of claim attached to the claim form, was made on 6 November 2012. The delay has been acceptably explained in the evidence. The estate has not been distributed. The claim is a sound one. Without the contractual revision a key feature of the testator's intentions would be frustrated, namely the creation of a large discretionary trust over the bulk of his assets rather than gifting his children direct control over them. I am in no doubt that an extension would in the circumstances have been just and proper, if I had considered it appropriate to order rectification.

Clause 6.2.3

21. In the course of the hearing counsel for the First Defendant raised an additional point relating to Clause 6.2.3, which provides that

> *"This gift* [i.e. the gift to the trust] *shall bear its own inheritance tax if any"*

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10 *Standard Portland Cement* was an Australian appeal to the Privy Council.

11 Other perhaps than to render academic, and thus head off, an appeal against the decision on construction (though this could not obtain in the *Standard Portland Cement Co Pty Ltd* case).

12 This time-limit cannot be circumvented for the reason I indicated in the last sentence of paragraph 17 above.

and also derived from the precedent used by Ms Greenough. Such a clause reverses the default position that in the absence of contrary words non-residuary gifts generally take effect free of tax. Its practical significance, according to what I was told by counsel, is that any amount transferred in by way of top-up would only reach the trust shorn of a sum equal to the tax thereon. Counsel for the First Defendant proposed that I should also delete this provision by either construction or rectification.

22. While the route of construction seems unpromising - Clause 6.2.3 does not appear to be plainly absurd on its face, nor does any absurdity or ambiguity apparently emerge from the addition of "armchair" evidence - the alternative route of rectification may be more encouraging. Deletion of Clause 6.2.3 by either route was not however raised in the trustees' application, which is all that is before me. It was also not raised, let alone addressed, in any of the four skeleton arguments, and only briefly discussed in oral submissions of one counsel. The Clause did not feature in the evidence of Ms Greenough, and she was not cross-examined in relation to it. Nor am I satisfied that without proper advance notice all parties have properly considered and satisfied themselves that the change is either justified or would not prejudice them (including the further parties whom they represent under the court order to that effect).

23. Moreover, no application has been made to me for an extension of time to seek rectification by deletion of Clause 6.2.3. The factors to which the court should have regard in considering any such application (see *Chittock v Stevens*, loc.cit.), would require to be addressed in supporting evidence from the applicant, which is also not before the court, even if at the end of the day I might have determined that they are outweighed by the desirability of bringing the will into conformity with the testator's intentions.

24. I accordingly make no order in relation to Clause 6.2.3. I do not understand or intend this to preclude a future application for its deletion by construction or rectification, though it would have to be supported by proper evidence, and in the latter case also require a properly founded and evidenced application for extension of time.