IN THE HIGH COURT OF JUSTICE PT-2019-000446

BUSINESS AND PROPERTY COURTS

OF ENGLAND AND WALES

PROPERTY, TRUSTS AND PROBATE LIST (Ch)

[2020] EWHC 3585 (Ch)

The Rolls Building
7 Rolls Building
Fetter Lane
Holborn
London, EC4A 1NL

Friday, 6 November 2020

Before:

HIS HONOUR JUDGE KRAMER

(Sitting as a Judge of the High Court)

B E T W E E N :

ELIZABETH BARRETT — Claimant

- and -

HAMMOND
& THIRTY OTHERS — Defendants

MS A. TAYLOR (instructed by Simpson Millar) appeared on behalf of the Claimant.

THE DEFENDANTS were not present and were not represented.

J U D G M E N T

JUDGE KRAMER:

1 I will give an *extempore* judgment but you will have to accept it is not going to be as fluent as it would be if I had produced a reserved judgment, but it does seem to me that this is something I can deal with in an *extempore* way, and people want to know where they stand sooner than later.

2 This is my judgment. The claimant Elizabeth Barrett is the sole proving executor of the estate of Dr Robert Munroe Black, who died on 19 February 2018. She obtained a limited grant of probate on 5 December 2018, and the full grant on 24 June 2019. The claimant was in doubt as to the effect of the deceased's will dated 29 September 1998, and a first codicil of 2 August 2005.

3 In summary, her uncertainty arose from the fact that in his will the testator had directed the executors to divide the balance of the residuary estate, after the payment of specific legacies, into fifty-two parts, and to distribute as to six named individuals six parts each, and eight charities two parts each, the sum of which totals fifty-two.

4 In his codicil of 2 August 2005 the testator deleted gifts to two of the named individuals, and added gifts of two parts to two additional charities. In so doing, he had revoked gifts of twelve parts, but only granted additional gifts of four. He did not alter the direction for the residuary estate to be divided into fifty-two parts. Thus, it appeared that there was no provision for the distribution of the balance of eight parts as to which there may have been a partial intestacy.

5 On 15 April 2019 the claimant applied to the court for directions as to the proper distribution of the estate of the deceased, or alternatively whether she should first issue a claim for rectification of the will. On 13 May 2019 Master Kaye gave permission for the claimant to issue a Part 8 claim seeking a determination as to the true construction of clause 9 of the will, and the first codicil, and a claim for rectification of the will and codicil under s.20(1)(a) of the Administration of Justice Act 1982, the latter claim being stayed until determination of the construction point.

6 The Part 8 claim was issued on 31 May 2019. On 11 July 2019 Master Kaye determined that upon a true construction of the will and its two codicils, dated 2 August 2005 and 1 March 2016, a partial intestacy had arisen under clause 9 of the will with respect to eight parts of the fifty-two. She ordered that the claimant proceed with her rectification claim.

7 The claim, as amended, seeks rectification of the 29 September will by replacement of the words "fifty-two parts" in clause 9 of the will with the words "forty-four parts", or alternatively to omit the words "as to the division into fifty-two parts". Rectification is sought both under ss.20(1)(a) and (b) of the Administration of Justice Act 1982. The amendment became necessary because, after the issue of proceedings, documents were found which indicated that it may have been that there had been a failure to understand or give effect to the instructions given by the deceased. In the event that rectification is refused, a direction is sought as to the proper distribution of the estate.

8 The case that has been argued before me is the rectification claim. The claimant is represented by Ms Araba Taylor of counsel. All those interested in the estate of the deceased have been joined, including those who would be interested on the intestacy. There are thirty-one defendants to the claim. One of them, I see from the title of the claim, is now deceased, that is Jacqueline Elsie Myles, but her personal representatives have written to say

they are not going to be taking part. Only one defendant has sought to oppose the claim, that is Penelope Tweedy, the twenty-second defendant. Another defendant, Catherine Mary Hammond, has appeared as defendant to support the application for rectification.

9 Penelope Tweedy is the deceased's first cousin once removed. She filed two witness statements in opposition to rectification and to support the contention that there had been a partial intestacy. The significance of such a conclusion, as far as she is concerned, is that she would be one of the group of next of kin who could benefit from a distribution on intestacy. On 29 October 2020, however, she wrote to the court indicating that she wished to withdraw her evidence and take no further part in the proceedings.

10 Miss Hammond is one of the beneficiaries under the will, and the sister of the claimant.

11 The current net estate stands at £937,476.42. If the residue is divided into fifty-two parts, each is worth £18,028.39, and in the event of a forty-four-part division £21,206.28. Under the terms of the will, gifts of the residue to the named individuals which fail, pass to the remaining named individuals pro rata. As a result of the deletion of two of the gifts by the codicil, and the deaths of two of the named beneficiaries before the residue, the twenty-four parts which were gifted to the original six individuals fall to be shared between the claimant and her sister equally.

The evidence:

12 I will first look at an outline of the evidence, then I will come to more detailed evidence in a moment. The witness statements in support of the application are those of the claimant, dated 30 May 2019 and 25 February 2020, Catherine Hammond, dated 12 May 2020, and Catherine Green, the claimant's solicitor. The latter has attempted to obtain documents and information from the solicitors who dealt with the execution of the will and the codicil, but without success.

13 As regards the statements of Miss Tweedy, albeit that she says she wishes to withdraw her evidence, it cannot be completely ignored as the court has to adopt a quasi-inquisitorial approach in cases concerning wills. As is often stated, the court's obligation is to see that, so far as possible, the intentions of the testator are honoured. Much of the content of her statements, however, amounts to comment on what inferences I should draw from the documents and her opinion upon the justice of the case. None of that is admissible on the issues which I have to determine. Nevertheless, she does give brief information as to the deceased's family history which assists to give a more complete picture of his background.

14 I have also heard evidence from Miss Hammond on this subject. I learned from Miss Tweedy's statements that the deceased was an only child whose mother died at a young age. His closest relatives at the time were his cousins, just really a handful of cousins, and his uncle, Stanley Wright, whose wife had also died at a young age. She does not say what became of the deceased's father, but she says that the uncle took a paternal interest in the development of the deceased.

15 It is sufficient to say that it does not appear that he had many close relatives in his youth. This is in contrast to his wife's family, as shown from a family tree and genealogy report exhibited to the claimant's witness statement of 13 April 2019. The report shows that the deceased and his wife, Beatrice Maud Black, had no children. On the wife's side, she had four siblings: Sydney, Lesley, John and Ernest. All of them had children, and in the case of Lesley it is apparent he had grandchildren. The pecuniary and residuary legatees are all

blood relatives of Beatrice save for Ellen Higgs, the wife of her brother Lesley, though Ellen was one of the residuary legatees removed by the first codicil.

16 According to Miss Tweedy, the deceased was a man of high intelligence. He had a PhD in physical chemistry, was a fellow of the Chemical Society, an associate at the Royal Institute of Chemistry and a leading research chemist with BICC Plc. He published more than forty scientific and technical papers.

17 I have also heard from Catherine Hammond. The evidence as to his intellectual acumen has not been doubted, and I consider it safe to conclude that he was someone of considerable intelligence, with a scientific background, and that in some ways emerges from the close detail which is apparent from the bequests he has made in his will.

18 I heard oral evidence from the claimant, Catherine Hammond and Catherine Green the solicitor. They all confirmed their witness statement. Catherine Hammond was asked some questions about the deceased and his family ties by Ms Taylor. Having heard Ms Hammond, I accept what she says. The deceased did not have, certainly all the time she knew him, close ties to his own family, and she seems to have known him from the time of his marriage in the late 1950s, when she was about seven.

19 At the time of the marriage, there was only a stepmother who was alive. He did not have a good relationship with his stepmother. Ms Hammond ascertained from him that he was aggrieved that when he went to university she had sold his collection of swords. He did not talk about his father. Miss Hammond only knows about his father because the deceased was a Mason, and there were a couple of medals, or jewels as Masons calls them, which were in the name of the deceased's father.

20 The deceased did not talk about his family, and he had many celebrations, wedding anniversaries, parties, women's nights, apparently at the Masonic Lodge, where he would invite members of his wife's family but never members of his own family. According to Ms Hamond, he very much appreciated that by marrying his wife Beatrice, he was marrying into a large and close-knit family, in which he could take part.

21 So, the evidence really is all one way, and I find that his domestic attachments were to his wife's family, which is a good explanation as to how he came to make the will that he did. It is notable that although Miss Tweedy refers to his younger years and the deceased being part of a close-knit group, his mother having died when he was only three, she does not say anything about having any part in his life, her or any other member of her side of the family, in his adult years.

22 That is the background. I will now come to the will, and the making of wills. Before I come to look at the terms of the will, there was a history to the making of this will, a progression here, which it is necessary to look at, which only became apparent when Ms Barrett, in clearing the deceased's house, came across some effects, which included testamentary documents.

23 The first set are testamentary documents in unexecuted form, some of which have handwritten notes on them, and which are draft mirror wills prepared by the deceased and his wife Beatrice. These wills are very similar in form to the will which I am asked to consider in that the husband and wife each give their estate to the other, with a provision to deal with the residuary estate. I should say there are also some rather touching gifts of chattels, dogs and the tortoises, and some small legacies. But, essentially, the remainder of

the estate, after gifts to the husband and the wife, are split into small pecuniary legacies, and then in the 1988 version, which is in draft but on the evidence looks as if it must have been executed at some stage, although in precisely what form we do not know, they then divided the residuary estate into fifty-six equal parts. They gave parts to named individuals who were members of Beatrice's side of the family, by and large, some to religious institutions, and fewer parts to charities. That is in 1988.

24 The next document in point of time is a document entitled, "Synopsis of wills May 1998." The executors and the trustees were altered. Midland Bank was altered to HSBC because, of course, the latter took over the former. As regards the bequests, the will provided that the residuary estate was to be given to the spouse, but if that gift failed, because he or she did not survive the testator, there were to be a large number of legacies given to named members of Beatrice's family, and also to some clerics. After the specific legacies, the remainder of the estate was to be divided into a number of parts. As to six members of Beatrice's family, each was to have six parts of that larger sum, and there were to be eight gifts of two parts to a number of charities.

25 As to what the "Synopsis of wills" contemplated, we see it is headed, "Remainder of estate to be divided into fifty". "Fifty" has been crossed out, "parts" and an asterisk appear and "fifty-two" inserted. It so happens that the apportionment of the gifts contemplated by the list of named individuals and charities would total fifty-two. So, somebody has crossed out the "fifty" and put in "fifty-two". And then, on this document, which becomes relevant later, someone has crossed out "Sydney Arthur Higgs" and "Ellen Gertrude Higgs", who were to receive six parts each, and crossed out the "fifty-two" and at the bottom written in "forty", and also to the right, in a different pen, the word "forty". That total corresponds with the deletion of two gifts to named individuals, which would total twelve; twelve from fifty-two leaves forty.

26 Now I come to the will itself. It is dated 29 September 1998, and was prepared by Lucas & Co, who were subsequently taken over by Simpson Millar, the current solicitors for the estate, for whom Miss Green works. She has been making enquiries, as I indicated, as to whether the will file could be found.

27 The first obvious point is that the will is professionally drafted. It names as executors Beatrice Maud Black and John Lesley Higgs, and Midland Bank Trust Company Limited as executors. The will provides for the claimant's property, his real and personal property, to be sold and converted, save for some money, with power to postpone. The first gift, is for all the balance of the estate to be given to the wife, Beatrice Maud Black, provided she survived her husband by one calendar month. If for any reason that gift failed, then the following provisions are substituted; that is clause 6 of the will. And then, we get to clause 8 of the will, in which the deceased bequeathed a number of pecuniary legacies, free of inheritance tax. There are twelve pecuniary legacies, to members of the family and also to, for instance, a goddaughter, and to two clerics, in particular at 8 (k) the Reverend Patrick G Hutton.

28 Clause 9 of the will reads:

> "Subject thereto [*so subject to giving those pecuniary legacies*], to divide the remainder of my residuary estate, and to stand possessed thereof, to divide the same into fifty-two parts upon trust (1) as to six parts for Sydney Arthur Higgs *[and the address, I shall not give the address or keep repeating absolutely]*; (2) as to six parts for Lesley Gordon Higgs;

> (3) as to six parts for Ellen known as Eileen Gertrude Higgs; (4) as to six parts for the said John Lesley Higgs; (5) as to six parts for Catherine Mary Hammond; and (6) as to six parts for Elizabeth Anne Barrett, provided always that in the event of any of the foregoing bequests of my residuary estate failing, then that part shall accrue to the other foregoing part or parts, and if more than one in the proportions which they bear to each other."

And the reference to John Lesley Higgs as "the said John Lesley Higgs" is that he also received a pecuniary bequest, he was one of the twelve who received the pecuniary bequest.

29 After the proviso, under which the survivors of those six are to share in the parts which failed for any reason, the most obvious one being death, there was then a gift of the remainder of this fifty-two parts to a number of charities, each of which were to get two parts each. So, there were another eight sets of two parts to go to the charities.

30 The only other part of the will I am going to look at, at this stage, is clause 13, which provides that:

> "If any of the charities named in my will have ceased to exist or have amalgamated with another charity before my death, then the gift to that named charity shall not fail, but my trustees shall pay it to the charitable institution which they consider most nearly fulfils the objects I intended to benefit."

31 I will look at the codicil now. On 2 August 2005 the deceased executed a codicil. He declares this to be, "The first codicil to my last will dated 29 September 1998", and he says:

> "(i) My will shall be construed and take effect as if (i) clauses 8(k), 9(i) and 9(iii) of my will shall be deleted in their entirety."

This had the effect of removing the pecuniary gift to the Reverend Hutton, and removed the gifts to Sydney Higgs and Ellen Higgs.

> "(ii) The following bequest shall be added to clause 9 of my will. As to two parts for the Royal Institution of Great Britain of 21 Albemarle Street London; (b) as to two parts for the Dogs Trust *[and then the address]*.
> (iii) There shall be inserted in clause 9 of my will an additional clause as follows: (a) in the event of any charity herein named in my will ceasing to exist in its current form at the date of my death, my trustees shall have the discretion to apply such gift as such charity would otherwise have received to such other charity that has in the opinion of my trustees most closely succeeded at the date of my death to its aims and objects.
>
> In all other respects, I confirm my will."

32 It is apparent that this codicil creates a problem in that it may produce an inconsistency with the will. The deletion of clauses 9(i) and 9(iii), the gifts to Sydney and Ellen, deleted two tranches of six parts of the fifty-two, so a deletion of twelve parts, but the gifts to the Royal Institution and the Dogs Trust of two parts each was only a gift of four parts, and that is how this potential partial intestacy for eight parts has arisen.

33 There is another way in which this codicil does not seem entirely consistent with the will, and that is the provision as to what is to happen if a charity ceases to exist. There is already a provision in the will as to what the trustees are to do if a charity does not exist at the date of the testator's death. They shall give the money to a charity with closely similar object. And here we have at (iii) in the codicil a provision in slightly different language to the effect that if a charity ceases, "To exist in its current form at the date of my death *(there is a)* …discretion to apply such gift as such charity would otherwise have received". That is the first codicil.

34 The second codicil I shall just deal with briefly. This provides for amendments to the will as to the appointment of the executor in clause 2, and in clause 4 there is a change in direction as to burial. Apart from that, there is a provision confirming the rest of the will.

35 Going back to the other testamentary documents which were found by Miss Barrett, we can see that in June 2003 a further typed document entitled, "Synopsis of will" was produced. It is here that the executors and trustees are shown as John Lesley Higgs and HSBC Trust Company. The bequest to the surviving spouse stays and provision is made in the event that if fails, as follows:

> "If the gift to the residuary estate fails to take effect, neither partner survives then (1) Personal chattels to be distributed according to a list left with the executors. (2) Legacies free of inheritance tax [*and there are a number of legacies with sums after them, and again somebody has deleted John Lesley Higgs and Ellen / Eileen Higgs]*. (3) The remainder of the estate is to be divided into fifty parts."

36 The reference to fifty parts, is a carry- over from the original synopsis which also referred to fifty parts, but was then crossed out and forty substituted. Somebody has crossed out, at the top, "Six parts to Lesley Gordon Higgs"; and at the bottom, somebody has added "Two parts to the Dogs Trust."

37 There is then a handwritten document, and the evidence of Miss Barrett is that this is the handwriting of Beatrice Black. We see that this appears to be a page by page consideration of the will, and it says, "P1, Midland Bank change of name. P2, John Higgs £5,000 and six parts. P3, Father Patrick remove. Sydney remove. Lesley okay, six parts. John covered twice. Eileen remove". There are a number of other names that appear indicating who was to get a pecuniary legacy.

38 Next, we come to a document heading entitled, "Parts". We see that there is a list: "Eileen, Lesley, John, Catherine, Liz". They have all got the number "six" after them which is underlined. It says, "thirty". This is followed by a list of eight charities which are to get two parts each, sixteen in total. So, that is thirty plus sixteen. Someone has done a calculation, which has got "thirty, sixteen", and under that is "six", with the name "Syd" next to it. Now, remember Syd is somebody who it is said is to be removed from the gifts. That totals to fifty-two. There is a total of fifty-two shown under that.

39 This is followed by, "Notes on changes to wills", which seems to have been prepared by the deceased or his wife; it was found amongst their effects. It says:

> "P3, delete 8(k) to the Reverend Patrick G Hutton. Delete 9(i)(a) as to six parts for Sydney Arthur Higgs. P4, delete 8(iii) as to six parts for

> Ellen, known as Eileen. And P5, add 9(xv) as to two parts for the Royal Institution of Great Britain."

40 There is a letter to Lucas & Co from Mrs Black, writing on her own behalf and behalf of her husband, and it says:

> "Re wills, the latest revision of the wills of Beatrice Maud Black, and Robert Munroe Black was made in September 1998, when you were requested to make changes in the executors and trustees."

Now, I pause there. I said earlier that there is some evidence that the 1988 wills, which we see in draft, were, in some form, executed. That is supported by the reference of Mrs Black to the 1998 wills being the latest revision. She goes on:

> "There are now a further number of minor amendments which we would like you to make on our behalf. These are P3, delete 8k, the Reverend Patrick G Hutton. Delete 9(i) as to six parts for Sydney Arthur Higgs, now deceased. [Page 4] Delete 8(iii) as to six parts for Ellen, known as Eileen."

It is quite apparent that an error has been made because Ellen appears at 9(iii) not 8(iii).

> "[And page 5] Add 9(xv) as to two parts for the Royal Institution of Great Britain. Add 9(xvi) as to two parts for the Dogs Trust.
> We should be pleased if you would advise us as to the best way of making this further revision. Presumably it will be necessary for us to call at your offices
> Yours sincerely,
> Mrs Black."

41 The only solicitor's reply we have is dated 26 July 2005. It reads:

> "Dear Mr and Mrs Black.
> Your codicils.
> Thank you for your letter of 20 July 2005. In accordance with your instructions, I now include drafts for your perusal. I would be most grateful if you could read through the drafts carefully, and obviously anything that does not comply with your instructions, or needs clarification or amendment, should be brought to my attention at your earliest convenience. Once you have had the chance to peruse the drafts, revert to me with any queries you may have; I shall prepare the engrossments ready for execution in the office with the requisite witnesses so as to complete the legal formalities. *[He goes on to deal with the fee]*."

42 The draft which he included is an unexecuted version of the codicil which was ultimately executed by the testator. He refers to "drafts", and I think it is worthy of introducing at this stage that the evidence is that Mr and Mrs Black had mirror wills, and so although we don't have Mrs Black's will in front of us, it will have been the same as Mr Black's will, and therefore her codicil will have been the same as his. We see that because the second draft codicil appears in the exhibits to Ms Barrett's statement. On this evidence I can fairly conclude that this couple made mirror wills. That is the history of the testamentary documents.

43 Of those who were to benefit under the will, John Lesley Higgs died on 24 July 2015. Sydney Higgs had died as well, before 2005. Vry importantly, for present purposes, Beatrice died on 25 September 2013, predeceasing her husband. Mr Black did not make another will after his wife died. His will took effect, and the gifts which came into effect on his death, were those which applied in circumstances where his wife had predeceased him.

44 Turning to the court's approach in a case such as this. I will first deal with the 1982 Act, although the case has been argued on other bases as well. Section 20 of the Administration of Justice Act 1982 provides that a court may rectify a will in two situations.:

> "(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."

45 In *Re Segelman* [1996] Ch 171 at 180, Chadwick J explained that s.20(1) requires the court to examine three questions:

> "First, what were the testator's intentions with regard to dispositions in respect of which rectification is sought? Second, is the will expressed so that it fails to carry out those intentions? Third, is the will expressed as it is 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?"

46 The first question I have to look at is what was the testator's intention with regard to the dispositions, and whether the will, as expressed, fails to carry them out. The case for the first defendant, the claimant being neutral in this, is that the testator intended to dispose of the whole of his estate, and indeed he intended that there would not be a partial intestacy to benefit, in the event, members of the family whom he did not talk about and, on the face of it, had not seen for many, many years.

47 The question as to whether there is scope to rectify in this case is really determined by my finding as to the testator's intentions, because the will has already been construed by Master Kay. If it was his intention to dispose of the whole of his estate, and not to leave a partial intestacy as to those eight parts, the will certainly does not carry out those intentions. So, I must first look at what extrinsic evidence there is as to his intention.

48 First, the fact that his gift of the six parts to named individuals included a provision under which, if any gift failed, their share was redistributed between the other named individuals is an indication that he was not seeking to have any part, certainly of that distribution, fall into an intestacy.

49 Secondly, as regards the charities, the fact that in clause 13 of the will, and indeed in what appears to be the 1988 will, there were provisions regarding how the trustees should deal with the part of any charity which had changed its form, either by ceasing to exist or amalgamating to similar charities, is also an indication that he was intending to distribute the whole of his estate. The provision in the codicil about giving a discretion to distribute does not detract from that conclusion.

50 Thirdly, I look at the care with which the deceased and his wife have gone about distributing the estate. The identification of individual legacies to a large number of people, coupled with this sweeping-up provision as regards the residue, suggests that considerable attention was given as to how the estate was to be distributed, and indicates that certainly he, indeed they, wanted their estates to go largely to Beatrice's family should they be predeceased by their spouse. I bear in mind that this was a joint intention, evidenced by the mirror wills, and that after the death of his wife the deceased did not change his will, he kept it as it was.

51 Fourthly, there are the testamentary documents, which I have looked at earlier in the judgment, the synopses. These show that the deceased and his wife were looking for the number of parts to match the whole of the parts that were available for distribution. This is evidenced by, if one looks at the document called "Synopsis of will, May 1998", the fact that care has been taken to see that the numbers add up. Against, "Remainder of estate to be divided into fifty parts", there are actually fifty-two parts shown, and somebody has crossed out the "fifty", put in an asterisk, and "fifty-two" appears. That is the position as regards the 1998 will.

52 This synopsis must have been looked at by the deceased and his wife in 2005, prior to him dealing with the codicil, because the changes in the codicil, certainly two of the changes, are marked upon this document. "Sydney Arthur Higgs" and "Ellen Gertrude Higgs", are crossed out, and somebody in a different hand, it seems, or certainly a different pen, has written "Delete". That does not look like Beatrice's handwriting because we have the later document, as to which I have evidence from Miss Barrett, which I accept is in her handwriting.

53 Having crossed out "Sydney Arthur Higgs" and "Ellen Gertrude Higgs", in the same pen as that used for the crossing-out, there appears the word "forty" and, of course, until you add the other two charities to the total, there are only forty parts to go around amongst the list, once Sydney and Ellen had been removed. Somebody has written "forty" in what looks like a different hand, crossed out the "fifty-two" and written a "forty". That is an indication, a very clear indication, that the deceased and his wife intended that the number of parts which were to be available would match the number of gifts that were made and there would be no balance to fall into a partial intestacy. What is more, they had actually done the counting.

54 It is right that there is the document "June 2003 Synopsis", which must have been prepared before the 2005 change, in which Lesley Gordon Higgs has been removed from the residuary share. By that stage, Eileen's name has been taken out altogether, and somebody has written at the bottom the reference to the charity for the dogs.

55 Further, before the instructions were given to the solicitor to make the change, there is the handwritten document from which it is clear that Mrs Black is going through the will, page by page, identifying who is to come out and who is to go in; again she looks at the numbers. How many parts does this leave? It tots up to fifty-two only by including Sydney, who earlier on she indicates is to be removed.

56 These documents taken together are good evidence that both Mr Black and his wife, but importantly for these circumstances Mr Black, had intended that there would not be anything left over to fall into a partial intestacy. To add to that, we have the old authority to which I have been referred by Ms Taylor, the case of *Harrison, Turner & Hellard* (1885) 30 Ch. D 390 where the Master of the Rolls, Lord Esher said at 393:

> "There is one rule of construction which to my mind is a golden rule, viz that when a testator has executed a will in solemn form, we must assume that he did not intend to make it a solemn farce, that he did not intend to die intestate when he has gone through the form of making a will. We ought, if possible, to read the will so as to lead to a testacy not an intestacy."

57 Here, the testator having gone to the trouble of making a highly detailed will which appears on the face of it, certainly the 1998 will, to have disposed of the whole of his estate, the question is: On balance, is it more likely than not that he intended by his will and indeed by the codicil, to dispose of the whole of his estate? And taking these factors into account, it seems to me, on balance, that that is what he intended to do.

58 The fact that the will does not give effect to this intention gives rise to the following questions, why did it fail in this respect and is there power to put this right, to avoid the partial intestacy, which on balance I find that he was seeking to avoid by the gifts that he made?

59 This question turns on a determination as to whether this is a case where s.20 of the Administration of Justice Act 1982 can assist. Before I come to the Act, I should just say this. In the course of the hearing, I had to look a little further into the law as there was a question as to whether the Administration of Justice Act could amend a codicil.

60 It is quite clear from s.1 of the Wills Act 1837 that the definition of "will" includes a codicil, so although *Williams on Wills* assumes that it can be used to rectify a codicil, if one needed authority for that proposition, it comes from the fact that a "will" includes a codicil for the purposes of the 1837 Act. There is no other definition of "will" in the Administration of Justice Act 1982, so for will we can read "including codicil."

61 The effect of confirmation of the will, which appears in both the 2005 and in the 2013 codicils, had the effect of bringing the disposition of the will down to the date of the codicil, as if a new will had been made, and amounts to a republication of the will. As the codicil is annexed to the will, the two are to be construed as one testamentary disposition. This is all well settled and to be found in *Williams on Wills*. I do not need to lengthen the judgment by referring to further authority.

62 Accordingly, the codicil can be rectified pursuant to the Act, but the question under the Act is whether what has happened here is that there has been a clerical error or failure on the part of someone, to whom the testator has given instructions, to understand those instructions. I have really been addressed on the basis that what has happened here is a clerical error, and, I have to say, I agree with that analysis.

63 In *Marley v Rawlings* [2014] UKSC 51, a case in which the husband and wife made mirror wills, but due to an error on the part of the clerk who arranged for execution of the wills, the husband signed the wife's will, and the wife that of the husband, rectification was available on the basis that this was a clerical error. As regards to what amounts to a clerical error, Lord Neuberger said:

> "[75] I accept that the expression 'clerical error' can have a narrow meaning, which would be limited to mistakes involved in copying or writing out a document, and would not include a mistake of the type that occurred in this case. However, the expression is not one with a precise or well-established, let alone a technical, meaning. The expression also

can carry a wider meaning, namely a mistake arising out of office work of a relatively routine nature, such as preparing, filing, sending, organising the execution of, a document (save, possibly, to the extent that the activity involves some special expertise). Those are activities which are properly described as 'clerical', and a mistake in connection with those activities, such as wrongly filing a document or putting the wrong document in an envelope, can properly be called 'a clerical error'."

"[76] For present purposes, of course, 'clerical error' is an expression which has to be interpreted in its context, and, in particular on the assumption that section 20 is intended to represent a rational and coherent basis for rectifying wills. While I appreciate that there is an argument for saying that it does nothing to discourage carelessness, it seems to me that the expression 'clerical error' in section 20(1)(a) should be given a wide, rather than a narrow, meaning."

"[77] First, rectification of other documents (including unilateral documents) is not limited to cases of clerical error, however wide a meaning that expression is given. Accordingly, given that there is no apparent reason for a different rule for wills, it would appear appropriate that the grounds for rectification is as wide for wills as the words of section 20(1) can properly allow."

"[78] Secondly, there is no apparent limit on the applicability of section 20(1)(b), which supports the notion that section 20(1)(a) should not be treated as being of limited application. However, section 20(1)(b) also has a potential limiting effect on the ambit of section 20(1)(a), in the sense that section 20(1)(a) should not be given a meaning which significantly overlaps with, let alone subsumes, that of section 20(1)(b)."

"[79] Thirdly, sections 17 to 21 of the 1982 Act are, as I see it, all aimed at making the law on wills more flexible and rendering it easier to validate or 'save' a will than previously. Section 17, which re-enacts section 9, is concerned with the 'relaxation' of formalities (see para 14 above); sections 18 and 19 introduce greater flexibility in relation to the effect of the testator's marriage and death of his issue; section 20 introduces rectification for the first time for wills; and section 21 permits the testator's subjective intention to be taken into account for the first time. The whole thrust of the provisions is therefore in favour of a broad interpretation of a provision such as section 20(1)(a)."

"[80] Fourthly, I consider that the law would be somewhat incoherent if subtle distinctions led to very different results in cases where the ultimate nature of the mistake is the same. If a solicitor is drafting two wills, and accidentally cuts and pastes the contents of B's draft will onto what he thinks is A's draft will, and hands it to A, who then executes it as his will, that will would be rectifiable under section 20(1)(a), as the solicitor's mistake would, on any view, be a clerical error – see paras 72 and 73 above. On the other hand, if the solicitor accidentally gives B's will to A to execute, and A executes it, that would not, on the respondents' case, be a clerical error and therefore rectification would not be available."

> "[81] While I accept that fine distinctions can often lead to different outcomes where one is near the limits of the scope of some statutory provisions, a distinction of this sort seems to me to be capricious or arbitrary. The position is essentially the same in the two cases. In each case, it was because his solicitor accidentally handed A a document which contained B's will rather than A's will, that A executed B's will thinking that it was his will. In each case, the reason that the will which A executed did not represent his intentions was a silly mistake by the solicitor in the mechanics of faithfully carrying out his instructions. In neither case did the mistake involve the solicitor misunderstanding or mischaracterising the testator's intention or instructions, or making any error of law or other expertise, so the error may fairly be characterised as 'clerical' – and there is no question of trespassing into section 20(1)(b) territory."

64 On one view, it may be thought that what has happened in this case is that the solicitor has been relied upon by the Blacks to make these alterations to the will, and indeed advise upon them, so it has been left to the solicitor to do it in the most appropriate way, as is evident from Mrs Black's letter of 20 July 2015 which ends, "We should be pleased if you would advise us as to the best way of making further revisions". The solicitor has picked up on the fact that Mrs Black had made an error in the paragraph numbering of Ellen Higgs's bequest, but had not appreciated that when looking at the will as a whole, there was a mismatch between this change in gifts and the splitting of the residuary estate into fifty-two parts.

65 From the fact that the solicitor introduced a provision as regards what was to happen if a charity ceased to exist in its current form into the codicil without making reference to clause 13 of the will I infer, and can safely find, that the solicitor cannot have made a close examination of the 1998 will. By close examination I mean did not read through it in its entirety, and thereby did not pick up on the fact that there was already a provision in the will relating to what was to happen should a charity beneficiary no longer exist.

66 I also infer from the fact that this extra provision has been included in the codicil that there must have been some contact between the Blacks and the solicitors because it seems unlikely that without being given an instruction to introduce this provision, the solicitors would have done so without explanation. The most likely course of events is that the solicitor raised the question as to what was to happen if one of the charities ceased to exist, and this extra term has been put in. Had it been put in without any prior discussion with Mr and Mrs Black, I would have expected it to have been referred to in his letter of 26 July 2005, i.e. to say that he had introduced yet another provision and explained why that was necessary.

67 It may be argued that what the solicitor has done has fallen with the area of not exercising a solicitor's expertise in drafting when producing the codicil, which on the face of what Lord Neuberger said may not be within the definition of a "clerical error". One can quite see how in *Marley*, the error was entirely procedural, just handing over the wrong copy of the will. But, of course, unnecessarily fine distinctions could arise if actually reading the will to ensure it was that of the correct testator fell within the solicitor's expertise. In this case what the solicitor needed to do was to appreciate that unless something was done about the number of parts into which the residuary estate had been split, there was going to be a partial intestacy.

68 The fact that the solicitor did not apply his mind to it is evident from the letter which he sent with the draft codicils, which made no reference to the mismatch. That is something I would expect to appear in a letter, although there is the possibility that it could have been the subject of a previous discussion. Given, however, that both Dr and Mrs Black intended to dispose of the whole of their estates, on my finding, it would be unusual, if that was not to be achieved as a result of the variations in the codicil, for the solicitor not to go into writing to make it clear that the steps he was taking would have the effect of creating a partial intestacy, and warning them of the consequences, but he did not do so.

69 Ms Taylor says that what has happened here is properly regarded as a "clerical error", and she referred me to the case of *Clarke v Brothwood* [2007] WLTR 329. She says it is a useful because it was a case in which there was a mathematical error. Reading from the headnote:

> "The claimant, C, was a solicitor and executor, who had drafted a will for the deceased, M, directing her trustees to pay the proceeds of her residuary estate to one-tenth share to each of two named charities; and as to one-twentieth share to each of four named godchildren. The effect was on the literal construction to leave 60 per cent of the residuary estate undisposed of, and the will was approved by M, and duly executed. The solicitor accepted that a drafting error had been made, and the claimant sought rectification of the will in such a way that the estate was divided not in fractional but in percentage shares, which would account for 100 per cent of the revenue."

70 In Clarke, instead of one-twentieth shares being given to these four named godchildren, it was accepted that what had been intended was shares of 20 per cent. There it was held that the testator had not intended to be intestate and that the use of one-twentieth instead of 20 per cent was a clerical error. This, of course, is a case prior to *Marley*. At [42] the judge said:

> "Even if the error was Miss Martin's the jurisdiction is open to rectify the will provided Mr Clarke (or Mrs Hall) did not apply their mind to the effect of the will as drafted. It is to my mind inconceivable that if Mr Clarke had applied his mind to the problem he would not have appreciated that 60% of the residuary estate was undisposed of. Thus I am satisfied that he did not. In those circumstances the jurisdiction to rectify the will exists and I propose to rectify it."

71 It was the solicitor's failure to consider that the testator wanted to dispose of the whole of his estate which resulted in the solicitor including figures in the will which left 60 per cent undisposed of. That was held to be sufficient to amount to a clerical error. Ms Taylor says that this has parallels with the present case and I agree. Whilst there was a carveout for the exercise of specialist services to be found in *Marley* which would more properly fall under s.20(1)(b) of the 1982 Act, rather than within the category of clerical errors under 20(1)(a), there is nothing particularly specialist about appreciating that if one starts with fifty-two shares but only dispose of forty-four of them, eight of them remain undisposed of. Neither is there any specialist service engaged in order to appreciate that if the codicil reduces the number of shares gifted they are not going to amount to as many as the parts which are specified in the will.

72 I take the view that what has happened is this case is just the arithmetical consequence of the new instruction, which found its way into the codicil, upon the provision in the will for

splitting the residue into a number of shares. The reconciliation of the figures did not require any particular legal expertise and does not point to a misunderstanding as to the instructions. It was just a clerical oversight, a failure to balance the figures so that at the end of the day the number of shares disposed of coincided with the total of the parts. As a result, the court does have a power to rectify under s.20(1)(a).

73 I should just deal with one point in deference to that which has been said by Penelope Tweedy. She has withdrawn her objection, her defence to the claim, but she did say in the course of her statement that it was her view that Mr Black would have wanted to benefit some of his blood relatives with whom he had, some many years ago, a close relationship. That may well be her view, but it is certainly not an intention that can be ascertained from the whole history of will making starting with the 1998 will and the synopses. There is nothing within these documents to suggest that Mr and Mrs Black had changed their intentions so that they wished part of their estate to pass on intestacy. Furthermore, that is even more unlikely, given the fact they were so particular about who was to get what. They did not simply name classes of people, they named individuals who were to receive not just the pecuniary legacies but also the shares of the fifty-two parts. I cannot accept the argument, which Miss Tweedy is not pursuing, but certainly appears in her statement, that one can read into what has happened, or infer, that her first cousin twice removed intended that part of his estate go by way of a partial intestacy, and particularly these eight shares.

74 The court has a power to rectify and should rectify in this case as it should seek to give effect to the intentions of the testator, if it can. The way this can be achieved, given that the codicil can be rectified, is to put it into the form it should have been had the solicitor paid sufficient attention to the impact of the change wrought by the codicil, namely to add words to the codicil to reflect the change in the number of parties amongst whom the shares were to be distributed. That can be done by rectifying clause 9 so that it reads, "Subject thereto, to divide the remainder of my residuary estate, and to stand possessed thereof, to divide the same into-- ", and then delete "fifty-two parts", and insert "forty-four parts".

75 Not only is it clear that this was the deceased's intention, but it is manifest from the fact that the deceased and his wife were alive to the fact, when they made alterations to the scope of the synopsis documents, that if they changed the number of shares distributed, they had to change the number of parts into which the residuary estate was divided. Unfortunately, that was lost on the solicitor. I have no doubt that the deceased and his wife were relying upon the solicitor because the terms of the instruction were that that was exactly what they were doing, and I would not expect them to have challenged what the solicitor produced. They would expect that he was doing that which was expected of him.

76 Accordingly, I grant the application for rectification in those terms. Now, is there anything I have left out? Oh yes, I have left out your *Re Morris* argument actually, which you do not need, but----

MS TAYLOR: Well, my Lord, I think having regard to your view that it is *Williams on Wills* 1 - 0 Ms Taylor, and that I have been arguing both sides in order to be even-handed, I think that matter can be left to one side.

JUDGE KRAMER: Okay, right.

MS TAYLOR: My Lord, I have not prepared a draft order, but I am happy to do that if you can let me have an email address where I can send it for approval.

JUDGE KRAMER: Certainly.

MS TAYLOR: And what I will do is draft an order to the effect that the codicil is to be amended by the insertion of a clause, rectify clause 9, and then I will deal with the text from clause 9, and simply put "forty-four" in, in place of "fifty-two".

JUDGE KRAMER: Yes, by deleting "fifty-two", and replacing it with "forty-four".
MS TAYLOR: With "forty-four". It is not complicated, but I just did not want to anticipate matters. I think that is everything, and if I am careful about drafting, that will effect the rectification.
JUDGE KRAMER: Good.
MS TAYLOR: And then, the only other matter is costs.
JUDGE KRAMER: Yes, so what order are you seeking?
MS TAYLOR: Well, if the order is silent, then Miss Barrett can simply take the costs out of the estate. Other judges prefer to make an express order that the costs be paid out of the estate as an expense of the administration.

77 I think that is what I should do. Costs out of the estate as an expense of the administration. Are there any other costs that I have to consider in this case apart from the claimant's costs?
MS TAYLOR: No, Miss Tweedy has not asked for anything in the way of expenses. She did attend a couple of hearings, but she has not asked for anything in the way of expenses. She was unhappy at the thought that Miss Barrett would be getting her costs, because she assumed that Miss Barrett was acting in her own interests, but I think that is not the case, and that the person who has put forward the case for the family beneficiaries is Mrs Hammond, and that is something that the judgment has already referred to. But I just mention that for the sake of completeness on behalf of Miss Tweedy who is not present.
JUDGE KRAMER: Yes, I mean, Miss Tweedy's point rather falls away if she does not get anything out of this, doesn't it?
MS TAYLOR: Indeed. Indeed, if it is right that the will should be rectified, then yes, it does not really matter.

78 There was something in her letter. What did she say in her letter? Miss Tweedy's letter, let me just have a look. "The claimant has informed me … that any and all costs of the case will rest from them, and drawn from the estate". Actually, she does not say she wants any costs of anything.
MS TAYLOR: No, I do not think she has asked for any costs. She must have had expenses, but I do not think she has asked for any.
JUDGE KRAMER: No.
MS TAYLOR: So, it is really just the rectification of the codicil, and costs out of the estate as an expense of the administration. My Lord, could I have an email address?
JUDGE KRAMER: Yes (provided).
MS TAYLOR: Right, and I will do that now so there is no time to lose momentum.
JUDGE KRAMER: Well, thank you very much, Ms Taylor for your assistance----
MS TAYLOR: Thank you.
JUDGE KRAMER: -- in this case, it is always good to learn things. You have been very helpful; very helpful skeleton, authorities, and we have been able to deal with this in a very, it seems to me, streamlined way.
MS TAYLOR: Good.
JUDGE KRAMER: Which is good.

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Tel: 020 7831 5627 Fax: 020 7831 7737

civil@opus2.digital

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