IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD)
[2021] EWHC 1703 (Ch)

No. PT-2019-000428

Rolls Building
Fetter Lane
London, EC4A 1NL

Monday, 10 May 2021

Before:

MS CLARE AMBROSE

(Sitting as a Judge of the High Court)

B E T W E E N :

JACQUELINE YVONNE STELLA ALMOND
(as personal representative of Andrew James Goff deceased and representative party under CPR 19.7)
Claimant

- and -

(1) MICHELLE MOREAU GOFF
(2) CLAUDIA CHAPLIN
(3) BARNABY GOFF
(4) DAISY GOFF
(5) KITTY GOFF
(6) FREDERICK GOFF
(7) GABRIEL GOFF
(8) RAFFERTY GOFF
(a minor by his litigation friend Myles Stephen McIntosh)
(9) ANDREW BRIDGES
(10) SCOTT TAYLOR
(as a representative party under CPR 19.7)
Defendants

Hearing dates 4,5,6,7 May 2021

J U D G M E N T

(Via Microsoft Teams)

A P P E A R A N C E S

MR L. HARRIS (instructed by IBB Law LLP) appeared on behalf of the Claimant.

THE FIRST DEFENDANT did not attend and was not represented.

MR T. BRAITHWAITE (instructed by DTM Legal LLP) appeared on behalf of the Second Defendant.

MISS T. ANGUS QC and MR M. ROPER (instructed by Charles Russell Speechlys LLP) appeared on behalf of the Third to Seventh Defendants.

MISS R. FETHERSTONHAUGH (instructed by Cripps Pemberton Greenish) appeared on behalf of the Eighth Defendant.

MR D. MITCHELL (instructed by Colman Coyle) appeared on behalf of the Ninth Defendant.

MR T. BISHOP (instructed by Moore Barlow LLP) appeared on behalf of the Tenth Defendant.

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JUDGE AMBROSE:

Introduction

1 This case concerns the will of Mr Andrew James Goff. I refer to him as "the testator" as there are parties to the case who could answer to the title of Mr Goff. The claimant asked the court to determine various issues of construction that have arisen on the testator's will ("the will") that was dated 27 May 2016 but executed on 9 June 2016. The testator died on 30 September 2016.

2 The claimant in this matter is a solicitor who acts as attorney for the two acting executors of the will. A third executor renounced probate. She obtained a grant of letters of administration on 18 July 2017. She also acts in a representative capacity for the interests of any person who might be interested in any of the testator's shares under the last sentence of clause 7 of the will and the interests of any person as yet unborn who might be interested in relation to any trust created by clause 14 of the will, and also under a gift of a painting which originally raised one of the issues in this matter. She issued the claim in this matter on 28 May 2019 under CPR Part 64 naming the first to ninth defendants.

3 The first defendant is the testator's ex-wife from his first marriage who has indicated that she does not contest the claim. The third to seventh defendants are the testator's five adult children from his first marriage to the first defendant: Barnaby Goff, Daisy Goff, Kitty Goff, Frederick Goff, and Gabriel Goff. The testator's first marriage was dissolved in 2006. The adult children are aged between around 20 and 31 years. One of the adult children, the third defendant, Barnaby Goff, was an employee of the testator's business Stirling Ackroyd Limited ("SAL"). The second defendant is the testator's ex-wife from his second marriage. They were divorced in around 2013 and the eighth defendant is the testator's child of that marriage ("Rafferty"). He was born in 2010 and is now around 10 years and is represented by his litigation friend. I refer to the third to the eighth defendants as "the children". The ninth defendant is a former business colleague of the testator and the tenth defendant is a solicitor who acts as a representative defendant appointed by the order of Deputy Master Smith on 26 March 2020 under CPR Part 19.7 to represent those who might be interested in the 30 per cent shareholding of SAL which the testator made provision for in the will. The claim form was amended to join him as a party.

4 Several members of the family and former colleagues of the testator attended the hearing. I acknowledge that the process is probably a difficult one for them at a personal level and that the duration of the overall administration and proceedings relating to the will has added to that difficulty.

The Will

5 The will covered seventeen typed paragraphs over two and a half pages of A4. There is a manuscript paragraph at the end which was not admitted to probate and which gave rise to no dispute. The typed paragraphs were not given numbers by the testator, but paragraph numbers have been used in this claim for convenience. At the outset, the will provided as follows at clause 1 (adopting that numbering hereafter):

> *"I revoke all former wills made by me and declare this to be my final will and testament."*

6 The testator then named his executors and explained their role. At paragraph 4, he suggested that they immediately:

> "*...pay my funeral expenses and make sure of the smooth running of the various businesses and their debts and payment."*

7 Under clause 5, he provided:

> *"I request that the mortgage outstanding on Robin's End, Eastham, Worcestershire is paid off in reasonable time as to try and avoid extra costs. This property is then to be transferred to Claudia Chaplin, my ex-wife, in full and final settlement on my divorce, including the £341,000 to allow for my son Rafferty Goff's education and related reasonable costs. The inheritance in the rest of my will given to Rafferty Goff should cover these expenses leaving the above £341,000 for the benefit of Claudia Chaplin. I hope she spends the majority of these monies providing a good home for Rafferty and herself."*

8 Clause 6 provided:

> "*I also request the income from a secure property is given to Michelle Moreau and Claudia Chaplin to allow them to have a net income from these secure properties of £50,000 per annum. This is also to be linked to the UK's net retail price index. The actual freehold or long leasehold of these properties are, upon the death of Michelle Moreau and Claudia Chaplin, to be split equally between my surviving children."*

9 Clause 7 provided:

> *"I leave to my six children 10 per cent each of my 100 per cent ownership of Stirling Ackroyd Limited and leave to be divided equally amongst them 40 per cent ownership of Stirling Ackroyd New Homes. I leave to Nick Davies, who works at Stirling Ackroyd New Homes, the other 5 per cent of my shares. Of the remaining 40 per cent shareholding of Stirling Ackroyd Limited, I leave 10 per cent to Andrew Bridges, the other 30 per cent to be distributed sensibly amongst the other efficient and proven heads of department. When Andrew Bridges or any of the recipients of shares in Stirling Ackroyd leave the company, they are to be passed over at market value to other working directors or heads of departments."*

10 These three paragraphs have given rise to the claim and a dispute between the parties. There were then a number of gifts of money to the testator's sisters, his godchildren, a friend called Alice Herrick, and a nurse at the Royal Marsden who had cared for him during his illness.

11 Clauses 12 to 14 then provided:

> *"[12] All my other property and company ownerships, including my 50 per cent in Café Silva, which I own with my other sister Selina Hartley, my interests in Ibiza including 50 per cent of the shares of El Portalon Café, which I own with Justin Mallett, my Stirling Ackroyd interests in Istanbul, Ibiza and Spain, as well as the properties I am a joint owner of in Istanbul (which is subject to litigation), as well as my*

ownership of three villas in Croatia and 50 per cent of the property we own in Sofia, Bulgaria, for which we paid around £800,000.

[13] Cypress House, which I own jointly with my sister Nichola Sullings, and which is subject to the costs of the loan required to refurbish it, as well as legal costs and other sundries, which need to be worked out. A fair and reasonable agreement needs to be made with Nichola Sullings and the benefits of my interest also equally split between my surviving children. (My interest in the 'Orsman Road Properties' is also to be split equally between my surviving children).

[14] Importantly, wherever possible, my freehold and long leasehold of subject properties must be passed on by my recipient surviving children to their children, when their children reach the age of 25 years old. However, I seriously hope that monies should be paid by my recipient children to pay for the children's private/good education."

12 There are issues relating to these clauses. Clause 15 made provision for the testator's funeral. Clause 16 provided as follows:

> *"My personal affects I would like to leave to my surviving children and for them to genuinely and fairly split up between them. In the unlikely event there are any arguments or litigation then they are to be handed out by the executors according to what they think. I have valuable furniture based in a house in Lymington, Somerset and in Tim McCudden Hughes's barn, which needs to be split on the basis above."*

13 There was a final paragraph about a Gary Hume painting which initially gave rise to an issue but that has been resolved. There was the manuscript addition which is not disputed and then the signature and the witnesses' signatures. The issues of construction to be decided are set out in the details of claim as amended. Several issues were narrowed or resolved in advance of the hearing.

The Law

14 There is no real dispute on the broad approach to the construction of a will. All the parties recognise that the leading authority is *Marley v Rawlings* [2014] UKSC 2, [2015] AC 129 where the Supreme Court stated, quoting from Lord Neuberger's judgment:

> *"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...*
>
> *20. When it comes to interpreting wills, it seems to me that the approach should be the same. Whether the document in question is a commercial contract or a will, the aim is to identify the intention of*

the party or parties to the document by interpreting the words used in their documentary, factual and commercial context...

...

23. ...the well-known suggestion of James LJ in Boyes v Cook (1880) ... 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 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 paragraph 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 (e.g. by reference to what he told the drafter of the will, or another person, or by what was in any notes he made or earlier drafts of the will which he may have approved or caused to be prepared)."

15 The claimant summarised the position by saying that the object of the court is to ascertain the intention of the testator as expressed in his will when it is read as a whole in the light of any extrinsic evidence admissible for the purpose of its construction (referring to **Theobald on Wills**). Evidence of the testator's subjective intention is generally inadmissible. Thus, extrinsic evidence of the testator's declarations of intention as to the meaning to be put on the language of his will is inadmissible as is direct evidence of his testamentary intention.

Evidence of any instructions the testator gave for his will and of any declarations made by him as to what he intended to do or had done by his will is not admissible as direct evidence of his testamentary intention. The Administration of Justice Act 1982, section 21, provides for a statutory exception to this rule and allows direct evidence of the testator's intention to be admissible in the three circumstances set out in the extract above.

16 I was also referred to *Royal Society for the Prevention of Cruelty to Animals v Sharp & Ors* [2010] EWCA Civ 1474 which is sometimes treated as the precursor to what counsel described as the modern approach in *Marley*. In this case, Lord Neuberger MR stated that:

> *"31. As Patten LJ impliedly acknowledges by his reference to Investors Compensation Scheme Limited v West Bromwich Building Society [1998] 1 WLR 896, the court's approach to the interpretation of wills is, in practice, very similar to its approach to the interpretation of contracts. Of course, in the case of a contract, there are at least two parties involved in negotiating its terms, whereas a will is a unilateral document. However, it is clear from a number of cases that the approach to interpretation of unilateral documents, such as a notice or a patent, is effectively the same, as a matter of principle, as the court's approach to the interpretation of a bilateral or multilateral document such as a contract: see Mannai Investments Ltd v Eagle Star Insurance Co plc [1997] AC 749 and Kirin-Amgen Inc v Hoechst Marion Roussel Ltd [2005] RPC 9.*
>
> *32. One obvious difference between a bilateral document such as a contract and a unilateral document such as a will, is that parties negotiating a contract may well be consciously content to include an obscurely drafted provision, on the basis that it represents an acceptable compromise, which enables overall agreement to be reached, whereas, save in a most exceptional case, which it is hard to conceive, a person making a will has no interest in obscurity."*

17 In that case, Patten LJ stated:

> "22. *The first relevant consideration in my view is that the will was professionally drafted by a solicitor who has to be assumed to be competent. Although solicitors do obviously make mistakes, there needs to be something in the language of the document or its admissible background to justify that inference. More importantly, those factors must be such as to permit the court to give the words actually used a meaning which is not strictly in accordance with the usual rules of grammar or vocabulary: see Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896."*

18 All the parties before me emphasised that this was a home-made will and was not professionally drafted by a solicitor. Lord Neuberger MR rightly points out that a person making a will has no interest in obscurity. However, at a more general level, a will is to be interpreted adopting the same approach as that adopted in construing a commercial contract, as *Marley* tells us. For that purpose, the testator's intention is identified in the same way. A testator, like a contracting party, may choose to make a will in his own words and avoid professional advice, or a template, or technical language. A layperson drafting a will is not assumed to have the competence of a solicitor with professional experience. He is more likely

to make drafting mistakes. If the assets or gifts are complex, then there is greater potential for gaps, uncertainty, or falling foul of legal rules. As a general rule, the testator must be taken to have accepted that risk. The absence of legal advice, including whether this was a choice, is part of the surrounding circumstances against which the will is to be construed. The court can make allowance for lack of experience, or knowledge of technical terms, or legal rules but the same basic principles of construction apply whether the will is professionally drafted or home-made. The court cannot improve or rewrite the will. It must give effect to the will the testator chose to make.

The evidence

19 There are a number of statements from the claimant. In addition, statements were adduced from Claudia Chaplin, Nicholas Davies, Brett Sullings, Nick Karamanlis, Andy Blythe, Andrew Bridges, Andrew Morford, Scott Taylor (the tenth defendant), Rebecca Piper (the solicitor acting for the third to seventh defendants) and also Myles McIntosh, Rafferty's litigation friend. There was also some disclosure.

The factual background

20 Turning to the factual background, the deceased was born in 1961 and was around 55 years old when he died. He had one full sister Nichola Sullings, two half-sisters, and a stepsister from his father's second marriage. He married twice, first to the first defendant in 1989 and his five older children were from this marriage, born between 1990 and 2000. He remarried the second defendant in 2008 and they had Rafferty in 2010. The testator was diagnosed with cancer in 2011 and underwent treatment in the following years. By 2016, he, his friends, and his colleagues knew it was very serious.

21 The testator and the second defendant divorced in early 2013 when Rafferty was not yet three. They settled their financial claims by a consent order sealed by the court on 15 July 2013 ("the 2013 Order") and this was approved by the court. The order started with the recitals making clear that the parties agreed that the provisions were in full and final settlement of all claims of any nature arising out of their divorce. It contained a number of recitals under which the parties set out their agreement and included their undertakings to the court. These undertakings were signed and contained a penal notice by which both sides made clear that if they broke their promise, they recognised they could be sent to prison.

22 The undertakings included the testator undertaking to ensure that Can Bueno, a property in Ibiza, was held for the benefit of the second defendant and would pass to the second defendant on his death without falling into his estate. Also, that he would execute a legal charge in favour of the second defendant over Robin's End, a property in Worcestershire, to secure all sums, including paragraphs 1, 2, 3, 5, and 6 of the order. He also undertook to execute a transfer document effecting a transfer of Can Bueno to the second defendant to be held in escrow. Then there were a number of orders. The first, paragraph 1, was for a lump sum of £750,000 to be paid by 1 April 2014 by the testator to the second defendant. Paragraph 2 was for £15,000 to be paid by the testator to the second defendant and this was paid. Paragraph 3 was for the sum of £314,000 to be paid to the second defendant for the benefit of Rafferty by 1 July 2014. The recital said it was to be placed in a joint account to be used to discharge any costs incurred by Rafferty in connection with his education and any surplus to be paid to the second defendant and retained by her to pay to Rafferty on his 25th birthday. Paragraph 4 was in relation to Can Bueno and said:

> "[The testator] shall forthwith transfer to the second defendant one half of his interest in Can Bueno, Ibiza, subject only to the existing mortgage."

23 I note that paragraph 4 of the order was somewhat contradictory to the provisions of the recital which referred to different agreements. Paragraph 5 of the order provided for joint lives periodic payments of £25,000 per year to be paid to the second defendant until June 2022, which was when Rafferty would be around 12, and paragraph 6 provided for periodic payments thereafter of £15,000 per year until Rafferty ceased education.

24 The testator made a Spanish will on 16 April 2014 ("the Spanish will") under which he left Can Bueno to the second defendant and left other Spanish properties to his children to be split equally. The evidence showed that Spanish law advice had been taken at around this time about transferring Can Bueno and that the testator and the second defendant had been told there would be a large tax liability on transferring it into the second defendant's name. The lump sums referred to in the order were not paid but the second defendant moved into Robin's End in 2014. There was correspondence between the testator and the second defendant's lawyer where he put forward a plan that Robin's End be transferred to the second defendant but this did not take place. There was also correspondence about realising property assets to pay the second defendant the lump sums that had been ordered.

25 Turning to the testator's business: the testator set up SAL in the 1990s. That company is now called SA 2017 Limited. He was the sole director and owned 100 per cent of the shares. The company is no longer trading. Its main asset now is a director's loan of over £4 million and there is potentially a claim due to it of around £1.3 million for reclaimed tax. The company was a chain of estate agents starting in Shoreditch and Clerkenwell and ending with around six branches, mainly around Hackney and Shoreditch, with a couple of branches closer to the West End. In 2016, it had a turnover that was over £6 million and some reported as high as £10 million per annum.

26 It is necessary to introduce some of those who worked for the company as this is relevant to the issue in clause 7. I refer to the account provided by the tenth defendant based on the evidence of the individuals concerned, which was not disputed. The ninth defendant, Andrew Bridges, started working for the company in 1997. At that stage, it was a relatively small company with only fifteen employees and he worked as managing director from 2003. I then refer to the individuals identified by the tenth defendant as persons who have expressed their belief that they fall within the class to benefit from a 30 per cent share of the company. These individuals are described by the tenth defendant as: Brett Sullings who worked for SAL from 2005 to 2007 and again from 2011, and was appointed head of the commercial department in 2014; Nick Karamanlis who worked for SAL from 4 May 2011 and was appointed as head of sales in December 2015; Andy Blythe who worked for SAL from 1 March 2006 and was appointed lettings director in January 2016; Daniela Troon who was appointed head of property management in April 2016; Andrew Morford who was appointed financial controller in February 2016 and who described himself as head of the finance department; and Barnaby Goff who was head of marketing from 2016.

27 On around 28 September 2016, the testator gave Mr Bridges, Mr Karamanlis, and Mr Blythe letters purporting to terminate their employment. The termination of their employment and its date is a factual matter that is disputed. The testator died only a couple of days later on 30 September and HMRC presented a winding up petition five days later. In January 2017, SAL went into a CVA. SAL's freehold property and business was sold in 2017 and it stopped trading.

28 The testator also owned a 45 per cent share in another company, Stirling Ackroyd New Homes Limited. He also owned four ordinary shares in a company called Urban Edge Group Limited, which was a property business made up largely of commercial real estate. The company was owned with another individual. The value of the testator's share is uncertain. However, figures of around £11 million or £12 million have been put forward.

29 Turning to previous wills, the testator had executed a will in 2012 that had been prepared by solicitors. It included a discretionary trust for business interests and Mr Bridges was named as a beneficiary. This will was made before he divorced the second defendant. In 2013, he instructed another firm of solicitors who drafted a will that was never signed. The will I have to construe was prepared by the testator during May 2016 with the assistance of his friend Alice Herrick. The evidence was that she knew he had terminal cancer and encouraged him to make a further will. She helped him put together the will. He had dictated his wishes to her and she had typed them up. She had printed it off in her art gallery and it had been executed in a local café on 9 June 2016.

30 On 18 July 2016, the testator had a meeting with his solicitor who was then dealing with his corporate matters, a Mr Austen Hall. The testator and Mr Hall had gone to the private client department of the firm of solicitors to which the claimant belongs. That firm had seen the will before me and drawn up another draft. That new draft had been signed but not properly executed. Under the will before me, the testator appointed his sister Dr Susanna Ryan and two friends as executors, one of whom renounced, and they appointed the claimant as attorney.

Are there residuary gifts?

31 Turning to the issues at 8.1 of the details of claim, the issue was as to which clauses are residuary. The questions were:

(a) Whether all the gifts made in the various paragraphs of the will that follow clause 4 are properly construed as residuary gifts;

(b) If not, whether the paragraph in the will which begins with the words "all my other property and company ownerships" and the two paragraphs that immediately follow clause 13 and clause 14 are together properly construed as a residuary gift;

(c) If not, whether on a correct construction of the will, there is no residuary gift in the will; and

(d) How each gift in the will should properly be characterised for the purpose of administration if not as a residuary gift.

32 At the hearing, no one contended that all the gifts following clause 4 were to be treated as residuary. As to whether clauses 12 - 14 are residuary gifts, the claimant's position was that they were not residuary gifts but she remained neutral beyond that. Her evidence suggested that a number of the assets referred to in clause 12 had not yet been identified, including the interest in Café Silva and El Portalon café, and also the property in Istanbul. Other assets referred to were assets of SAL or UEG, although there was Spanish property, including Can Bueno and another smaller property. The children say that clauses 12 - 14 were not intended to pass the residue and the will does not contain a residuary gift.

33 The second, ninth, and tenth defendant maintain that clauses 12 - 14 are residuary. This issue matters because it would affect the level of abatement as between the gifts under clauses 5 -

7 and other clauses. The second defendant says that residue is dealt with in clauses 12 - 14 and that there is no general vesting in trustees or anything that would make the whole will residuary in nature.

34 The tenth defendant says that clause 12 begins with the language of a residuary gift. It starts "all my other property" and this is a wide term that should be construed to include all of the testator's real and personal estate. He relied on commentary from earlier cases in **Theobald on Wills** and **Williams on Wills**. The tenth defendant's counsel argued that the term had introduced the enumerated property using the word "including". He suggested that the sequence of the clauses is of little significance in a home-made will where the testator added his thoughts rather than drafting a will as a professional might. He argued that it was not at all likely that the testator intended to die intestate and clauses 12 - 14 appear to be a gift of residue and should be construed in accordance with their natural and ordinary meaning. He argued that if the testator had intended "property" in the opening words of clause 12 to refer only to real property, he would have made this clear, either by saying as much or using the more correct terminology adopted in clause 14, or he would have made clear that he was covering all of his properties since property had been used in the singular elsewhere.

35 It was submitted that to the extent that the clause could be regarded as ambiguous, the presumption against intestacy was engaged and the will ought, if possible, to be read so as to lead to a testacy and not a partial intestacy. This was also part of an application of common sense required by *Marley*. Counsel relied on the wording of the earlier will that the testator had executed and also the draft that had been drawn up in 2013. I considered that these had limited weight in showing his intentions or in establishing what was said to be the testator's dictionary such that one could infer that he would have been aware that a reference to property would cover both real and personal property and intended it as such. In any event, as the children argued, these wills contained much clearer wording to identify a residuary gift.

36 Turning to the case of the testator's adult children, they argue that the meaning of "property" in clause 12 must be read in its context and that the presumption against intestacy should be given limited weight following *Marley* and especially in the case of a home-made will where the testator lacks experience of the usual wordings adopted to avoid a partial intestacy. They referred to an Irish case, *Howell v Howell* [1992] IR 290, where a gift of "any other asset" was not treated as residuary.

37 Counsel for Rafferty wisely followed the submissions made on behalf of the adult children. She kept her own submissions brief and followed the earlier arguments, also arguing that clauses 12 and 13 are specific gifts and there would have been no need to make reference to company ownerships if all property had already been covered.

Conclusions on residuary gifts

38 Turning to the first issue: not all gifts following clause 4 are residuary and that construction is rejected. I accept that the essence of a residuary gift is that it sweeps up all assets. While a professionally drafted will would normally include a residuary gift, the testator had made a positive choice to draft and execute his own will in his own words in circumstances where he clearly could have taken advantage of legal advice. He had taken professional advice in drawing up a will in both 2012 and 2013, and he could have taken advice in June 2016 if he had wished since he did so later in 2016.

39 I am satisfied that clauses 12 - 14 are not to be construed as residuary gifts. On the ordinary and natural meaning of clause 12, the testator was not making provision to sweep up

everything he owned. He used the term "property" by reference to real property interests and used that term several times. The use of "all other" took effect to distinguish the gift of Robin's End and the SAL shares made in clauses 5 and 7.

40 The reference in opening words to "all other" was made not only in relation to property but also to company ownerships. On its ordinary meaning, this language was covering two categories of asset: property, and company ownerships. It then identified a number of assets that were all interests in real property or a company. The meaning of property in this context was real property, not a much broader range covering all assets of any type. I also accept that clause 14 referred to clause 12 and that was common ground but its wording was also consistent with clause 12 being about real property since it covered "my leaseholds and freeholds of subject properties". The fact that the testator specified two categories of real property here did not justify treating the earlier reference as wider not least since he used the word "subject" suggesting he was talking about specific subject properties rather than intending a wide sweep up.

41 The word "property" can have a wide range of meanings, including a very broad meaning covering both real and personal property. Where such a term is used, it is best understood in its context. Here, the context firmly suggested that the testator was not referring to all other real and personal property since he had grouped it solely with company ownerships most probably because he regarded these as his most important groups of assets, not in order to make a residuary gift. Even if the meaning of property in clause 12 were to be regarded as ambiguous, the evidence did not show any clear intention on the testator's part to treat clause 12 as a residuary gift or to cover all property not otherwise covered.

42 I generally preferred the children's submissions on this issue although I consider that the sequence of the clauses in the will could be given very little weight and did not really favour either side's case in any decisive way. The testator had drawn up a number of paragraphs without numbers or headings. Although the manuscript addition was probably an afterthought, it was difficult to draw any inference as to the effect of clause 12 from the sequence of the clauses or the fact that he put provision for his funeral expenses and business debts at the beginning and his personal effects and painting at the end. The ordinary sequence of a professionally drafted will can be relevant as to the effect of the provisions. However, there is no clear rule or presumption as to priority or the manner in which gifts take effect, or whether they are treated as sweeping up, and this was made clear in *Royal Society for the Prevention of Cruelty to Animals v Sharp & Ors* in [37] - [38] of the judgment of Lord Neuberger MR.

43 The children were correct to suggest that previous authorities on the meaning of "all other property" were of limited weight especially since the commentary made clear that all words must be read in context. It is commonly said, as in *Howell v Howell*, that no will has its twin, and that reference to other cases is of limited assistance. The presumption against intestacy was of limited weight for a number of reasons. As explained in *Howell v Howell*, it will have less weight if it conflicts with the principle of treating beneficiaries with equality. More significantly, it is well established that it should generally not be applied to do violence to the clear meaning of a will and this approach has been reinforced by reliance on the natural and ordinary meaning of the wording. As counsel for Rafferty explained, the previous authorities on construction are to be regarded with some caution. The presumption against intestacy is one that has already long been regarded with some scepticism as is clear from the case of *Abbott* [1944] 2 All ER 457 where Lord Greene MR said at 459 G-H:

> *"Speaking for myself, I have always thought that the presumption against intestacy a very dangerous line of thought. It involves speculation as to the intentions of a class of persons, namely testators, which as anybody with experience knows is a highly capricious class. Some persons deliberately die intestate. Some deliberately die intestate save as to certain items. It is very dangerous to place too much reliance on the supposed wish of testators in general not to die intestate. In my opinion, it is quite inadmissible to place any reliance upon it where, by so doing, violence is done to some clear disposition in a will."*

44 Counsel for the tenth defendant questioned whether the Master of the Rolls was right to treat testators as a highly capricious class. I need not decide that but consider that he was correct to suggest that it is dangerous to suppose that a testator wished not to die intestate. This comment was made on considering a home-made will. In that context, there is little basis for assuming that the testator must have intended to make a residuary bequest or cover every asset. Rather than expecting to achieve the same level of accuracy and competence as a professional draughtsman, it is more likely that a testator executing a home-made will has objectively accepted the risk that the will may contain gaps or mistakes.

45 The case law suggests that the courts apply the presumption against intestacy most willingly where this is necessary to avoid a total intestacy or where the testator's obvious apparent intentions would otherwise be defeated. In that situation, the presumption was regarded as the golden rule to save the day. Now, rectification or Lord Hoffman's decision in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896; [1998] 1 All ER 98, HL(E), or *Marley* for that matter, might be more easily and effectively invoked. Previously, recourse was made to the presumption against intestacy; for example, in *Re Stevens* [1952] Ch. 323, Wynn-Parry J referred at 325 to Lord Esher's golden rule in Re Harrison (1885) 30 Ch D 398 at 393 that:

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

46 This case concerned drafting errors that would have defeated the whole purpose of making a will. In that situation, the presumption against intestacy can be seen as within the approach of *Marley* and looking to the purpose of the document. This approach has much more limited weight in circumstances such as the present where the effect argued for is wholly unlikely to have been within the testator's objective intentions in using the wording chosen.

47 Accordingly, there are no residuary gifts in the will. I turn to the final issue under paragraph 8(1) of the details of claim; the rest of this judgment deals with the other gifts in the will, including how they should be characterised for the purposes of administration, and I hope this can be reflected in the order.

Clause 5 and Robin's End

48 It was common ground that clause 5 would, if effective, operate as a gift of the testator's interest in Robin's End free of mortgage and that answered 8(2)(a) of the details of claim. The issue in 8(2)(b) was, "*Is clause 5 subject to a condition that the second defendant accepts Robin's End in full and final settlement of the sums owed to her and or any claim she has to*

Can Bueno under the 2013 order?" The second defendant accepted that the gift under clause 5 must be accepted in full and final settlement of her financial entitlements under the divorce, the lump-sum payments of £715,000 and £314,000, but not that she must also compromise her entitlement to Can Bueno under the 2013 order. Her counsel submitted that the testator's use of the language of settlement indicates a recognition of an unsatisfied claim arising from breach of an obligation. Looking at the circumstances known at the time the will was made, the testator was in breach of the 2013 order regarding the financial obligations but there was no suggestion that he had committed any default with respect to his obligations as to Can Bueno. On paragraph 8(2)(c), the second defendant submitted that monetary entitlements under the 2013 order were financial in nature and therefore more readily amenable to satisfaction under Robin's End than a claim to Can Bueno, and they were secured on Robin's End itself. It is rational to suppose that the testator intended to make a gift of property in settlement of debts secured against that property.

49 The second defendant's primary case is that the wording is unambiguously in favour of her construction but if wrong on that, then the evidence shows the testator's intention was to make a gift of Robin's End but not thereby deprive her of the existing claim to Can Bueno under the 2013 order, or the Spanish will made in 2014 which she says still applies. She says that correspondence from the testator in February 2015 shows that he was planning to settle the whole of Robin's End but also had to make a Spanish will leaving her Can Bueno, and that he had also recognised that his late payment of the lump sums had caused hardship and:

> *"For the sake of Rafferty and Claudia, I am looking to give much more than asked."*

Counsel points out that this position was followed up in June 2015 by an email from him to her saying that signing over Robin's End would cost him an extra £500,000.

50 Turning to the children's position, they say that the ordinary and natural meaning of clause 5 was that the gift was in full and final settlement of everything. It covered the lump-sum payments and also Can Bueno. What he was trying to do was substitute his obligations in the consent order for the gift in clause 5. The fact that the testator only referred to one of his obligations under the consent order does not mean that the others should be ignored. They say the overall purpose of the will was to sweep up all outstanding obligations and the adult children say there is no dispute that there were outstanding obligations in relation to Can Bueno at the time of the will.

51 Counsel for adult children, supported also by Rafferty's counsel, say that at the date of the will, the facts known to him would have included the terms of the 2013 order and also the fact that the two sums he had been ordered to pay, which totalled £1.064 million, remained outstanding. The equity in Can Bueno was worth around £0.176 million while the market value of Robin's End was between £1.5 million and £1.6 million. They say that the wording was intended to create a gift subject to a condition that the second defendant accepted Robin's End in full and final settlement of all obligations under the 2013 order. They say that the second defendant has a choice to claim as creditor under the 2013 order or as legatee, and that the gift and its terms are not being imposed on her. Either way, she must give credit for sums received from Robin's End.

52 The children say there is no ambiguity but if there is an ambiguity, the evidence shows the testator intended to keep Can Bueno, that the email correspondence relied on does not support the second defendant's construction, and that she has only produced a partial selection of what was passing between her and the testator. They rely on the fact that the testator had not paid

the lump sums or transferred Can Bueno, and also that the market values show that Robin's End mortgage free would have covered the combined value of both the lump sums and the equity in Can Bueno. Also, an email sent by Barnaby Goff to the testator's solicitors some three days before his death shows the testator saying that Can Bueno is to be split between the children but with the second defendant to have use of it for three weeks in the summer.

53 Rafferty's position is similarly "yes" to this question. Like the older children, it was submitted on his behalf that the words "full and final settlement on my divorce" could not be clearer in showing that all outstanding obligations under the 2013 order were being settled.

Conclusion on clause 5

54 The second defendant is both a beneficiary and creditor of the estate. Her claims as a creditor arise from the 2013 order. I accept that the terms agreed with the testator in full and final settlement of financial claims on their divorce in 2013 and approved by the court are important as part of the circumstances against which the will is to be construed. On its face, clause 5 was a provision principally about the transfer of Robin's End and the testator's intention was that it be transferred to the second defendant mortgage free. The gift was clearly subject to an express condition because it says "in full and final settlement on my divorce". On its face, it was in settlement of the testator's outstanding obligation to pay the lump sum of £314,000 that was required under the consent order. It is common ground that there was a typo in referring to £341,000. The second defendant also accepted that it was in settlement of the obligation to pay the other lump sum of £750,000.

55 The gift in clause 5 was in settlement of all sums due to the second defendant pursuant to paragraphs 1, 2, 3, 5, and 6 of the 2013 order. These were sums that had been agreed to be subject to a charge on Robin's End. Clause 5 must be read together with the 2013 order and cannot be construed in isolation. The transfer of Robin's End would have to be on the basis that she would release all charges on the property that were taken as a result of the 2013 order made on the divorce. The disputed question is as to whether the gift was made in settlement of her claim to Can Bueno under the 2013 order.

56 Can Bueno was regarded by the testator as an asset of personal importance rather than as merely a financial asset. This was apparent from the earlier wills which expressed Can Bueno as an important asset and the way the 2013 order preserved Can Bueno for the joint use of the testator for his lifetime. Indeed, even in late September 2016, when the testator was close to death and talking of passing it to his children, he specified that the second defendant should be able to use it for at least three weeks a year.

57 More importantly, the words "in full and final settlement on my divorce" meant that the gift was also being made in settlement of any obligation under the 2013 order to transfer Can Bueno. This is because the financial claims on the testator's divorce had already been settled and approved by the court. The evidence shows that the testator knew that he was in breach of the order for payment of lump sums. The second defendant could enforce that order by way of the charge on Robin's End. He wished to make clear that she could not enforce the lump sums under the 2013 order if she took Robin's End under the will. However, when making the will, there was no dispute regarding Can Bueno or enforcement of his obligations in that regard. The court order says that any financial claim on divorce, including any claim to Can Bueno, has been finally settled and so that must be assumed to be right. The 2013 order was not merely an agreement that could be varied or substituted by discussion. It cannot be construed as such. Clear words would be required to suggest an intention to undo that order and reopen a dispute that had already been litigated.

58 I take careful account of the fact that the second defendant did not provide a full file of all her correspondence with the testator. However, on the face of the 2013 order it was clear that Can Bueno would not be transferred in full to the second defendant but instead held by the parties as joint owners during the testator's lifetime, and he undertook to the court to leave it to her on his death. In addition, most of the correspondence after the divorce suggested that the transfer of Robin's End was not to affect Can Bueno, although I accept that shortly before his death, he talked of leaving it to the children. At the highest, this suggested that his views on Can Bueno were not fixed. However, in relation to the meaning of clause 5 and his expression of the transfer being in full and final settlement of the divorce, the factual matrix more firmly suggests that as at the date of the will, there was nothing to settle about Can Bueno. Indeed, the 2013 order had settled any such claim but the second defendant's charges on Robin's End would need to be released.

59 The wording the testator used in clause 5, even taken against its context in the correspondence that the children relied on from September 2016, is not sufficiently clear to suggest an intention to reopen the divorce settlement and adjust what had already been settled. The more natural meaning of the wording and its practical context in relation to the transfer of Robin's End is that "*full and final settlement on my divorce"* went to settling the outstanding sums that had been charged on Robin's End on the divorce. I am reinforced in my conclusion by considering whether, if the testator had made an offer to the second defendant in his lifetime on the terms of clause 5, and she had accepted it, this would be treated as releasing any right to Can Bueno under the 2013 order. This would have been wholly unlikely as any release of the accrued rights under the 2013 order would have required much clearer terms.

60 Turning to the final question in 8(2) of the details of claim, "Is clause 5 subject to a trust imposed for the benefit of Rafferty and, if so, on what terms?" Rafferty's counsel says that the wording means that the gift was subject to a trust imposed "to allow for my son Rafferty Goff's education". Counsel's position for Rafferty is that the natural and obvious meaning of the words is to direct the trustees to transfer the sale proceeds of Robin's End to Claudia to hold the lump sum of £314,000 on the terms of the 2013 order. Counsel submits that no effect can be given to the words immediately following because the lump sum for Rafferty is among the undischarged obligations in the 2013 order.

61 The second defendant says there is no trust imposed by clause 5. Her counsel left open whether a trust may have been created by the wording of the 2013 order but says the will did not create a trust. In particular, counsel submitted that this was clear from the intention shown in clause 5. The testator referred to £341,000 "to allow for my son Rafferty's education" but then goes on to say it will be for the benefit of the second defendant.

62 In my view, the will did not, in itself, impose a trust over the lump-sum of £314,000 that was to be paid under the 2013 order since the testator plainly intended on the ordinary meaning of the words for that sum to be used by the second defendant for her own benefit. There might be a separate question as to whether the 2013 order would have imposed a trust and as to whether Rafferty could seek to enforce obligations under that trust whether against the estate or his mother. It appears unlikely that the 2013 order was intended to create such a trust since paragraph 3 of the order would probably have used clearer wording but I make no decision on that. However, the will itself is not to be construed as imposing a trust obligation on the second defendant.

Does the will revoke the Spanish will?

63 Turning to the last question at 8(12) of the details of claim, namely whether the will revokes the testator's Spanish will and, if so, whether it disposes of Can Bueno and if so how, or whether Can Bueno instead passes on intestacy. This issue was introduced by an amendment dated 16 April 2021. The children say that the Spanish will was revoked since the will says so and the will contains gifts of the testator's Spanish property to the children. Such gifts would not have been possible if the Spanish will had remained valid. The second defendant, however, maintains that the will was not effective to revoke the Spanish will.

64 The second defendant suggested that the matter was better addressed as a matter of probate and refers to **Theobald** and case law such as *Lamothe v Lamothe* [2006] EWHC 1387 which justifies a wider approach that involves looking directly at the testator's intention rather than solely at the question as a matter of construction. Counsel for the second defendant says that much of the case law on revocation is about admitting a will to probate rather than construction. He says that the testator was required by court order to leave Can Bueno to the second defendant, that requirement is backed with a penal notice, and the testator did not intend to flout the 2013 order and cannot be treated as intending as such.

65 Counsel for the second defendant suggests that unless the Spanish will was to remain in force, the failure to address Can Bueno is an inexplicable omission and points again to the fact that Can Bueno was an important property and one that had personal significance. Counsel also submits that to the extent that the will does deal with Spanish interests in clause 12, it does so in a manner which duplicates the provisions of the Spanish will and is consistent with it. The second defendant also relies on cases such as *In the Estate of Wayland* [1951] 2 All ER 1041 to argue that the parties are not bound by the literal meaning of the revocation clause.

66 The second defendant relied, in particular, on the fact that there was no mention of Can Bueno and that this was difficult to understand if this was covered since it was an important asset. Counsel says that the Spanish properties covered in the will elsewhere were not treated inconsistently with the Spanish will. Effectively, the will was merely duplicating what had already been done under the Spanish will and the testator would not have intended to flout the 2013 order or cause his executors to be in breach of the 2013 order.

Conclusions on revocation

67 The wording of clause 1 was clear and unambiguous. Much clearer wording would have been required to mean that the testator had intended to leave the earlier Spanish will in force. *Wayland* was distinguishable as, in that case, it was plain on the face of the will that it did not apply to foreign property. Here, there was no language to justify construing clause 1 to mean the opposite of what it said. It is quite possible that the testator might have used words to preserve his Spanish will if the point had been drawn to his attention or he had taken legal advice, and that would have made matters more straightforward. The same point could be made in relation to many of the issues raised. However, that possibility does not justify a construction that might improve the will in that way.

68 It is not necessary to give clause 1 a meaning directly opposite to its ordinary meaning so as to preserve the second defendant's rights under the 2013 order or ensure that order would be given effect since it was clear that the second defendant could enforce the 2013 order even if the Spanish will was revoked. I was willing to look at the question more broadly as a question of probate by reference to cases such as *Lamothe v Lamothe* where the question is directly linked to whether there is clear and unequivocal evidence that a revocation was intended.

Indeed, the parties agreed that it was open to the court to make a decision as a matter of probate rather than purely as a matter of construction. However, the test is that there must be clear evidence of an intention that the earlier will has not been revoked. Here, the evidence relied on falls short of that.

69 Accordingly, I find that the will was effective to revoke the Spanish will and clause 12 is also sufficiently clear to cover Can Bueno. However, I note that the second defendant has a subsisting right to claim Can Bueno under the 2013 order.

Clause 6: the annual income

70 The issues raised were as to whether clause 6 created a valid gift of an annuity at £50,000 for life, what steps the claimant must take to fund the annuities, and what trusts apply to the excess income. The claimant took a neutral view on this issue although considered that the clause was ambiguous.

71 The third to seventh defendants argue that this was not a general gift or a direction to the trustees to buy a property since if he had intended this, he would have said so. They rely on case law such as *Paget v Huish* (1863) 1 Hem & M 663; 71 ER 291 and *Creed v Creed* (1844) 11 Cl & F 491; 8 ER 1187 as showing that this was a specific gift and that there was no intention that the second defendant be paid an income from the testator's general estate.

72 Counsel for Rafferty argues in the same way and argues that the clause is intended to be a specific legacy of the income from a secure property. They say the provision is ambiguous and rely on extrinsic evidence of the surrounding circumstances. They also say the deceased's intention supports their construction since the previous discussions had been for the second defendant to use an existing property within his ownership, or something in his companies, for an income. They say that the gift is ineffective as a gift of specific property as no property has been identified and it fails for lack of certainty. Even if the term "secure property" could be defined with sufficient certainty, there is nothing in the estate that conceivably meets that description and so the gift must fail. They rely on email correspondence from the first half of 2015 suggesting that the testator had in mind to give the second defendant a flat or a business she could manage and so was intending a specific legacy. They also pointed out that there would be insufficient money within the estate to provide for this gift even if construed as effective, although they correctly accepted that this was of limited relevance to the proper construction of the gift. Indeed, it was common ground that the testator had confused his assets with those of his companies. He included substantial gifts, for example under clause 12, of assets that belonged to the companies he held shareholdings in.

73 The second defendant said that the gift was to be characterised as a pecuniary bequest of an annuity. Counsel noted that the testator did not use the possessive pronoun when referring to "a secure property". He relied on the claimant's evidence suggesting that it be read as requiring executors to find a property and referred to **Theobald**, suggesting that a specific gift would be apparent from something on the face of the will to suggest it is referring to something the testator owned at the time or will own. Here, there was nothing to show he had a property in mind. The second defendant submitted that the analysis of the gift was best reflected by **Theobald**'s analysis in paragraph 24-024 and was willing to accept the adult children's alternative analysis.

Conclusions on clause 6

74 Looking at the ordinary meaning of the wording and the purpose of the document, I am satisfied that the testator was not intending to make a gift of specific property. The testator

was in the property business and if he had intended a specific property within his portfolio then it is unlikely that he would refer to it in such general terms. The evidence relied upon did not throw much light on the testator's purpose or likely expectations or show the testator's subjective intention regarding what property was envisaged. There had been discussion of different options, including buying the second defendant a flat or transferring a business to her to manage. This evidence did little to explain the intention behind clause 6 which was obviously something different, namely, to give both his ex-wives income from two secure properties that would never be their properties but would pass to his children on the wives' deaths.

75 This was a pecuniary bequest and I accept the adult children's alternative case, namely that if effective this was a gift of income from a property and consisting of a direction to purchase secure properties to hold on trust for each of the wives for life with the remainder to the adult children and Rafferty. It did not operate as a gift of an annuity or as a settled legacy. In terms of how the trust would apply excess income, if necessary, I also refer not only to the adult children's alternative analysis, but also **Theobald**'s analysis in paragraph 24-024.

Clause 7

76 The issues in clause 7 are related to the last two sentences dealing with the 40 per cent shareholding in SAL. The first issue relates to the gift of 10 per cent of the shares to Mr Andrew Bridges. The issue is whether clause 7 created a gift of 10 per cent to Andrew Bridges conditional upon his being employed by that company at the date of the deceased's death. The children maintained that this gift was subject to a condition precedent that Andrew Bridges remained employed with the company. In her representative capacity, the claimant supported the position of the children on this. Mr Bridges maintained that the gift was not subject to a condition of him being employed by SAL at the date of the deceased's death.

77 Before turning to the specific facts and wording, I deal with the correct legal approach to construing the will since there was some difference between the parties. The claimant had referred me to **Theobald** at paragraph 18-046 stating:

> *"Where it is clear on the face of a will that the testator has not accurately or completely expressed their meaning by the words used, and it is also clear what are the words which they have omitted, those words may be supplied in order to effectuate the intention, as collected from the context...*
>
> > *'the reading of words into a will as a matter of necessary implication is a measure which any court of construction should apply with the greatest caution. Many wills contain slips and omissions and fail to provide for contingencies which, to anyone reading the will, might appear contingencies for which any testator would obviously wish to provide. The court cannot rewrite the testamentary provisions in wills which come before it for construction. This type of treatment of an imperfect will is only legitimate when the court can collect from the four corners of the document that something has been omitted and, further, collect with sufficient precision the nature of the omission.' (as per* Re Whitrick [1957] 1 WLR 373)

It is not necessary that the precise words omitted should be obvious from the will but the substance of the omission must be clear..."

78 The claimant's counsel suggested that in construing the will, the court should not adopt the test used for construing implied terms in contracts. Counsel for the adult children agreed and also suggested there was no need to rely on the approach in **Theobald**. She submitted that while this approach regularly applied before the court had a power to rectify wills, it was now used less often since rectification was available. In addition, following *Marley*, the court would decide between competing constructions and approach the matter as one of construction.

79 Mr Bridges's counsel suggested that on its proper application, *Marley* and the principles of contractual interpretation as introduced supported his case since the testator had left the 10 per cent shareholding to Mr Bridges. If the gift was conditional, the deceased would have said so.

Conclusions on 10% gift under clause 7

80 The approach laid down in **Theobald** as ordinarily applied to wills is very similar to that applied to the implication of a term into a contract. It remains consistent with the approach laid down in *Marley* and the contract cases it refers to, although *Marley* can correctly be described as a more modern approach. However, *Marley* does not justify a wider approach to reading words into a will save that the court is no longer confined to the four corners of the document in identifying whether the implication is needed. Instead, the court can look at the question taking account of the *Marley* factors, the more specific armchair principle, and also evidence admissible if the gateways in section 21 of the Administration of Justice Act are triggered.

81 Applying *Marley* and taking account of evidence admissible if section 21 is triggered, it remains the case that a court should read words into a will with great caution. The court's role is not to rewrite or improve the will, even if the improved construction might better reflect common sense or the testator's purpose. The same restrictions apply to construing a contract as is clear from the contract authorities adopted in *Marley*. **Theobald** and *Re Whitrick* suggest that it is only appropriate to imply words into a will as a matter of necessary implication and where the court is satisfied with certainty that this was the testator's obvious intention.

82 This cautious approach based on necessity is reflected in the requirement that the court must be able to identify with precision the matter omitted. I accept the children's submission that clause 7 has to be read as a whole and look to the overall purpose and the facts known or assumed to be known by the testator at the date of the will. The wording showed that the testator regarded Andrew Bridges as an efficient and proven head of department and anticipated that Andrew Bridges would still be employed by SAL when the gift took effect. That is clear from the natural and ordinary meaning of the last sentence and also the reference to "other" in relation to proven and efficient heads of department. It is also consistent with the factual matrix, namely that the testator knew his cancer was terminal.

83 The adult children's counsel suggested that the natural inference to be drawn from the wording used under clause 7 and as a whole, and, in particular, the final sentence was that the gift was intended to be conditional upon Mr Bridges being an employee at the date of the testator's death.

84 Rafferty's counsel suggested it would fly in the face of common sense if Mr Bridges was allowed to benefit if not employed at the date of the gift and the gift was predicated on him being an employee.

85 The children suggested that their construction reflected the testator's purpose and the obvious meaning of the last lines, and that it would make no sense if Mr Bridges was given 10 per cent of the shareholding but then had to pass the shares back. They suggested that the last sentence could not make sense without the proposed condition and it would be farcical to have a transfer of shares that he would be obliged instantly to pass back.

86 I disagree. The more obvious meaning was that the testator was making an outright gift of 10 per cent to Andrew Bridges with the other 30 per cent going to others, and Andrew Bridges or any person leaving the company would have to sell their shares back at market value. The instructions given in the last sentence were more easily applied to the situation where Andrew Bridges was still employed when he received the shares but meticulous drafting is rarely achieved and was not to be expected with a home-made will.

87 The children argued that the presence of "other efficient and proven" supported their construction. However, that wording could equally be understood as distinguishing Mr Bridges's gift and excluding him from the 30 per cent gift. It was not necessary to adopt the children's construction to give effect to the last sentence of clause 7 or the provisions as a whole. To the contrary, the children's preferred construction involved introducing a condition that was neither necessary nor obvious. As Mr Bridges's counsel submitted, the last sentence of clause 7 was properly understood as being about passing shares back at market value rather than about denying a benefit or making it conditional. Both sides of the argument suggested that clause 7 was unambiguous and its ordinary and natural meaning on its face supported their construction. I agree, although consider that the meaning was clearly in favour of a gift without a condition precedent. Given that I do not accept the children's position and both sides ask me to consider substantial quantities of extrinsic evidence, I address it for completeness.

88 The evidence raised included previous wills, both the signed wills and also the draft wills, the minutes of meetings with the testator and his oral discussions with Mr Bridges. This evidence gave limited assistance whether as "armchair" evidence going to the factual matrix or purpose, or common sense, or as evidence of the testator's subjective intention if there was ambiguity to trigger the gateways under section 21(1) of the Administration of Justice Act. Any assistance that the evidence provided was of limited support for the children's construction. The evidence shows a common thread of the testator wanting to give shares to his colleagues in SAL on his death and a wish that if those colleagues leave the business or sell shares, the company or trustees should have an option to buy the shares back. This position was common to both sides.

89 It was, however, relevant that Mr Bridges was in a separate position to other staff who had given evidence. Unlike them, he had worked for the business for nearly twenty years with over ten years running the business as managing director, including several years when he was in control while the testator had been ill and less present. Even before the testator's illness, there had been serious discussions about Mr Bridges being given an equity share. This was separate from a gift by will, which would necessarily be linked to the testator's death. This context meant that the purpose of the gift could be understood as rewarding past services, and meeting past promises rather than being in recognition of current or continuing services, at the testator's death. While the testator was clearly hoping to secure the future of SAL with

shares staying within the company and his own family, the context does not justify finding that the purpose of the gift was only to reward Mr Bridges if he stayed.

90 The evidence shows that between 2012 and his death, the testator had a broadly consistent wish to give a 10 per cent shareholding to each of his children. However, he had considered several arrangements and allocations of shares amongst colleagues and the testator's views as to what he wanted changed. The changes included percentages and also who would benefit in the company and how they would benefit. This meant that the evidence was of limited weight in assessing with any precision his subjective intentions in June 2016. For example, he refers to the recipient colleagues as directors in 2012 and suggests Andrew Bridges select them. Later, he said he could determine them or his executors could. The structure of the gifts also varied considerably and had not been precisely pinned down at any stage. The clearest expression was in the statement of wishes made with the 2012 will which the children relied on in support of their construction. It stated:

> *"...of the remaining 40 per cent of shares, I would like 20 per cent immediately given to Mr Bridges with the remaining 20 per cent dispersible to other directors or future directors of Stirling Ackroyd nominated by Andrew Bridges and accepted unanimously by the Trustees. If Andrew Bridges or any other directors that are given shares in Stirling Ackroyd leaves the business and sell their shares, I would like you to insist on a formal, independent valuation and for Andrew (or such other director) to give the trustees reasonable time to pay from the profits of the business."*

91 This wording could not be regarded as evidence of an expectation or intention that Andrew Bridges's gift was subject to an implied proviso. It was notable that he had expressly included provisos for other beneficiaries elsewhere in the statement of wishes. The other evidence did not show an intention to make the gift to Andrew Bridges or others conditional on continued service with the firm, only that the shares should be kept within the company when the colleague left or wanted to sell his shares. Indeed, most of the proposals made clear that a colleague could, effectively, cash in his shares at any time rather than having to defer or give up benefits. However, a final proposal on 19 September 2016 suggested a John Lewis type arrangement which may have precluded this.

92 Mr Bridges also asked me to consider his evidence as to earlier discussions when the testator had agreed he was entitled to a shareholding for his work in building up the company and given assurances of that on a number of occasions. He also gave evidence of the testator telling him that his divorce meant he could not transfer a shareholding but the matter would be resolved in his will.

93 The children referred to a statement of wishes drawn up for the 2013 draft will in which the testator focused on family obligations rather than gifts to colleagues, perhaps unsurprisingly as this draft was made while his second divorce was ongoing. They also asked me to consider evidence that he had not wanted anyone in SAL to know the terms of his will and also evidence going to the context of Mr Bridges's dismissal. They submitted that the testator had not shared his actual testamentary intentions with Mr Bridges. They referred to minutes and attendance notes of discussions in the middle of July 2016 showing him discussing a gift of 30 per cent to "members of staff" but not a specific gift to Mr Bridges, and that by September 2016, there was discussion of terminating Mr Bridges's employment.

94 Even if admissible, this evidence did not show an intention supporting the children's construction or even that the testator's purpose was to place a condition on the gift to Mr

Bridges. In conclusion, I find that the gift in clause 7 was a specific gift, and it was not conditional on Mr Bridges remaining employed on the date of the deceased's death.

95 The further question was if the gift to Mr Andrew Bridges failed, whether the shareholding is now to be distributed to the children. This question does not arise but if I am wrong on that, then the gift would be distributed to the children in equal shares.

Clause 7: the 30% gift

96 A number of questions were raised in relation to the 30 per cent gift in clause 7. First, whether the wording used was sufficiently certain to create any gift of the deceased's remaining 30 per cent shares to any person. The children maintain that the gift fails for lack of certainty. Their position was that the testator's words "to be distributed sensibly amongst" indicates an intention that the trustees would have a discretionary power of distribution and so selection among a class of potential beneficiaries consisting of "efficient and proven heads of department" ("the class") and there was common ground that clause 7, if effective, would operate as a trust power exercisable over a class. This assessment was common ground and I accept that this would have been the characterisation of the gift.

97 The children say that a trust power for a class of objects will fail for uncertainty if it is not possible for the trustees to say with certainty whether any given individual falls within the class. It is not sufficient that the trustees are able to identify at least one person who falls within the class. On the other hand, provided it can be said with certainty that a substantial body of persons is within the class, the power would not fail simply because, as a result of evidential uncertainties, the trustees cannot identify every member of the class.

98 They say the testator intended the members of the class to meet two criteria. First, they must be heads of department at the relevant time. Secondly, they must be efficient and proven. They point to the tenth defendant's case and his evidence, and the fact that the tenth defendant has pointed out that there are seven people who claim to fall within the class and that while no one has disputed that four of those individuals - Mr Karamanlis, Mr Blythe, Mr Davies, and Mr Sullings - were heads of department, those four do not accept that the other three were heads of department. Mr Morford says they are all heads but Ms Troon and the third defendant have not given evidence.

99 The children say that in the case of many businesses, the term of head of department might be conceptually certain, but that is not the case here. In particular, on the evidence available, it is not clear whether heads of department mean:

a) any person who at the relevant time, in fact, headed up any aspect of the business, which reflects Mr Morford's evidence; or

b) persons who, at the relevant time, headed up those parts of the business which generated profits as Mr Karamanlis, Mr Sullings, Mr Davies, and Mr Blythe say; or

c) persons who, at the relevant time, had the job title head of a particular area of SAL's business;

d) persons who are in charge of a sufficiently distinct aspect of the business at the relevant time. This point was drawing on the fact that there was no evidence of a clear corporate structure in place and Ms Troon or Mr Blythe might fairly be regarded as sub-heads of department.

100 On this basis, the children say that the trustees cannot determine who is a head of department and they say that even if the term head of department was sufficiently certain at a conceptual level, the terms "proven and efficient" plainly are not. These terms involve some sort of evaluation by the trustees according to criteria which are inherently vague. The terms "proven and efficient" are no more conceptually certain than, for example, terms such as "deserving" or "helpful" referring to the *Public Trustee v Butler* [2012] EWHC 858 and *Re Wright's Will Trusts* (1999) 3 TLI 48.

101 The tenth defendant's primary position was that the effect of the gift of 30 per cent was clear on the natural meaning of the wording and there was no ambiguity or uncertainty. His position was that the wording "efficient and proven" was merely descriptive of the persons benefiting and did not introduce an additional requirement to the class of beneficiaries being heads of department. Counsel pointed to the evidence which showed that the testator had made the final decision in appointing any head of department and that these individuals had been handpicked and appointed by the testator. This established he had considered them to be efficient and proven, especially since the evidence showed that the four who gave evidence had worked for the company for several years so were proven. The tenth defendant argued that this showed that the testator had determined heads of department as the beneficiary rather than intending that the trustees select from the class.

102 The tenth defendant relied on evidence of minutes of a meeting held on 18 July 2016 when the testator had said that he would determine which members of staff would take the 30 per cent shareholding. The tenth defendant submitted that if there were any ambiguity as to whether the testator had meant to benefit the heads of department he had chosen, then his direction to Mr Hall, which was given less than six weeks after the will was executed, supported his construction. He submitted that the word "other" in clause 7 was merely a connecting word and did not show an intention that the trustees would have to assess whether a head of department was efficient and proven. The tenth defendant submitted that if "efficient and proven" were merely descriptive, then Messrs Davies and Sullings were clearly heads of department at the date of the testator's death and there was no conceptual difficulty in identifying the other heads of department. There would merely need to be directions to address the evidence on that factual question.

103 Counsel for the tenth defendant submitted that if I did not accept that the words were merely descriptive, then those words are additional criteria. They are metrics against which the performance of the heads of department can be evaluated. These employees had already been evaluated prior to the date of death and the same methods of evaluation could be used, including using sales targets or defined roles of performance, and this was merely a matter of evidence. The question could be measured by evidence of performance.

Conclusions on the 30% gift

104 There was common ground that the test for identifying certainty is laid down in *Re Baden's Deed Trusts (No 2)* [1973] Ch. 9 in the following passage from Megaw LJ's judgment:

> *"...the test [of certainty] is satisfied if, as regards at least a substantial number of objects, it can be said with certainty that they fall within the trust; even though, as regards a substantial number of other persons ... the answer would have to be, not 'they are outside the trust' but 'it is not proven whether they are in or out'. What is a 'substantial number' may well be a question of common sense and of degree in relation to the particular trust..."*

105 This test is derived from *McPhail v Doulton* [1971] AC 424 which made clear that a trust power is valid if it can be said with certainty that any given individual is or is not a member of the class of beneficiaries designated.

106 There was also common ground that there is an essential distinction between (1) conceptual uncertainty which is fatal, and (2) the evidential difficulty there may be in deciding whether it has been proven that a person is within the class, and such evidential difficulty would not defeat the gift. I do not accept that the words "efficient and proven" are merely words of explanation or description of those who are heads of department. I reject the suggestion that these words add nothing to the designation and were not a criterion by which the testator intended that beneficiaries would be identified. This approach would have deprived the words of any effect and fail to give them their ordinary meaning. Even looking at the context and any evidence put forward as going to the testator's intention, there was nothing to show that the words should be construed as such. The testator had deliberately made a gift to efficient and proven heads of department rather than simply heads of department. There was no reason to ignore the express words which, on their ordinary meaning, were designed to define and limit the gift.

107 As explained above, the testator's position over the previous months and years as to the identification of colleagues that would benefit changed. In September 2016, his views had changed again. So the July 2016 minutes relied on by the tenth defendant were of limited assistance in suggesting that he had already determined who would benefit by referring to heads of department. There was no evidence of an automatic gift to directors or heads of department and in 2012, he had suggested that any beneficiary would be nominated by Andrew Bridges. I consider that there was conceptual uncertainty in identifying the individuals who fall within the class of "efficient and proven heads of department".

108 In correspondence in 2018, the claimant had raised the issue as going to whether there was conceptual certainty in identifying those who were "efficient and proven" among heads of department. However, the issue raised in these proceedings was a wider one as to whether the wording in clause 7 was sufficiently certain to create any gift to any person. Thus, the pleaded issue was as to whether there was conceptual uncertainty in a gift to "efficient and proven heads of department". The evidence and arguments address this issue.

109 Looking first at the narrower issue as to whether there is conceptual uncertainty in identifying whether a head of department is efficient and proven, I am satisfied that the gift is conceptually uncertain. There are no clear criteria by which to identify whether any given head of department is efficient and proven. The efficiency and proven ability of an individual working in SAL as a head of department could mean different things and be measured against many potential benchmarks. This does not mean that the issue is one merely of evidential uncertainty because it remains unclear where to start in identifying relevant criteria and how to apply them.

110 Applying by analogy Fox LJ's approach in *Re Wright*, the testator did not explain what he meant by "efficient and proven", and this is impossible to deduce from his words or their context. The factual matrix against which the gift was made provided no support since the evidence as to how the company worked suggest there were no established measures of efficiency or, for that matter, measures of whether someone was proven. The company was run informally. Performance was measured mainly against sale figures rather than efficiency and the senior staff members often considered that this did not fairly reflect management responsibility. Personal relationships were a significant feature, including work trips. The evidence disclosed no clear indicators for measuring efficiency in the role of being head of

department or the testator's purposes in this respect. So it did not resolve the uncertainty on the face of the wording of the will.

111 The broader issue raised on the claim form as to identifying whether there was sufficient certainty in the gift to "efficient and proven heads of department" was no easier and the answer is the same, namely that the gift is too uncertain to be effective. The evidence suggested that there were no clear criteria in identifying who counted as a head of department since there was no defined corporate structure and, instead, people at the top of the company took different views as to who headed a department. As explained above, the fact that the gift was limited to heads of department did not thereby mean that an individual within that class fell within the description of efficient and proven. If the gift had been made simply to heads of department, the issue of uncertainty would have been much more finely balanced since there were some individuals who could objectively be treated as a head of department. However, I am satisfied that the gift to "efficient and proven heads of department" was conceptually uncertain and fails for uncertainty.

112 The further question was whether the gift failed on the ground that there are no potential objects or beneficiaries. The adult children contend that when clause 7 is read as a whole, the testator intended to bestow his shares on persons who were still working for SAL when the power came to be exercised and the most natural construction to be given to the clause is that the class is intended to be ascertained at the earliest point when the trustees could reasonably have been expected to be in a position to exercise their clause 7 power which must have been after the testator's death when they would have power to dispose of the shares. They said that since the company went into a CVA and there were no longer any working directors, the gift fails.

113 The tenth defendant submitted that the date on which the objects of the trust power are to be identified is the date of death and that there were members of the class on 30 September 2016 so the gift cannot fail for lack of beneficiaries. The tenth defendant relied on **Lewin on Trusts**, paragraphs 5-047 and 33-040, *Brown v Higgs* (1799) 4 Ves. Jr. 708, and *Longmore v Broom* (1802) 7 Ves. Jr. 124. He submitted that there is nothing in the drafting of clause 7 to indicate that its operation should be postponed and, therefore, its members are to be ascertained as at the date of death and there were certainly some working heads of department on the date of the testator's death, even if Mr Sullings and Mr Blythe were dismissed, which was part of the factual dispute.

114 The issue as to whether there were potential objects does not arise on the basis of my decision above. However, if it had arisen, I preferred the tenth defendant's submissions on this point and reject the claimant's suggestion that a statutory director of the now dormant company could count. The tenth defendant's submission was supported by a leading textbook and long-standing authorities, even if somewhat antique. This suggested that the date of death would be the starting point. **Lewin** states at 33–040:

> *"Subject to the wording of the particular instrument, we consider that the following propositions are warranted by the authorities:*
>
> *(1) Where a testator gives property subject to a trust power in favour of a class and it appears to be the intention that the distribution or selection should take place as soon as conveniently may be after his death, the court will execute the power in favour of the class as it stood at his death..."*

115 This proposition is unsurprising and reflects the ordinary expectation of a gift made by will. I accept it is a starting point and subject to the wording of the instrument. However, counsel for the children did not identify any aspect of the drafting that justified postponing the date when the class was to be ascertained. It was wholly unlikely that the testator would have intended the beneficiaries to have been selected on an unknown date that could be at least a year, or possibly several years, after his death. On the ordinary meaning of his will and taking account of the authorities, the testator is likely to have regarded his death as the cut-off for the gift taking effect, even though he would have known that the trustees would take some time to take all the necessary steps to exercise powers to distribute.

The gift over in the last sentence of clause 7

116 I turn to the issue as to whether the gift over in the final sentence of clause 7 is void for uncertainty or any other reason. The claimant, in her representative capacity and acting for any person who might be interested under the sentence, argued that if the first parts of the first clause create a gift, then the final sentence is effective to create a gift over. Counsel correctly accepted that the last sentence could only operate on a gift that was otherwise effective. Accordingly, based on my decision above, the issue only arises for decision in relation to the gift to Mr Bridges.

117 Counsel for the claimant argued that the gift was a right in the nature of an option. He correctly recognised that it was difficult to identify the precise nature of the interest and that it was not a conventional trust interest or a testamentary option. He recognised that while the testator may have envisaged a contractual option for the shares to be purchased, the will would not operate to create contractual rights. It was difficult to identify proprietary rights attaching to the shares since there was no trust interest and the recipients, such as Mr Bridges, were intended to receive absolute legal ownership. Counsel for the claimant also recognised that there was difficulty in identifying the class intended to benefit since the company was no longer trading and there were no heads of department. However, he suggested that the statutory director that remains in place would amount to a working director. He recognised a further difficulty regarding certainty of subject matter in identifying when the shares should be valued, by what mechanism, and how shares would be allocated amongst the beneficiaries.

118 The third defendant argued that the third sentence should be found void for uncertainty and also because any condition ceased to be effective since SAL no longer exists in the same form and there are no working directors or heads of department.

119 Turning to my conclusions, the wording in the last sentence of clause 7 was not effective to give rise to an enforceable gift. It is perhaps worth noting that on the ordinary meaning of the wording, taken against the surrounding circumstances, the testator is unlikely to have believed he was making a gift of any sort. There was no evidence of subjective intention to achieve such a gift or an enforceable proprietary interest. It is more likely that he wanted the recipients of the 40 per cent non-family shares, if no longer working directors or heads of department, to give first right of refusal on those shares at market value to those who were still working in the company since he had, in earlier discussions, referred to a put and call option.

120 Counsel for the claimant had valiantly explored all potential ways of analysing the last sentence to take effect as a valid gift. However, the subject matter lacked certainty because he could not properly identify the nature of the interest that was said to be the subject matter of the gift. In addition, there are now no individuals who would answer the description of the class intended to benefit. There are no longer any heads of department and the testator had plainly not intended to benefit a statutory director who had no operational role in the company.

This was plain from the language, including express reference to other working directors. Accordingly, any gift lacked sufficient certainty as to subject matter and was also invalid for lack of beneficiaries capable of enforcement. In addition, the gift would have been unenforceable as an impermissible restraint on alienation. The testator had intended to give an absolute interest in the shares and could not impose a condition restraining alienation. It was not necessary for me to explore the interesting analysis of the case law put forward by counsel for the third defendant in order to conclude that any gift was void as a matter of public policy as it would prevent Mr Bridges from disposing of the shares as he wished.

121 The last question on clause 17 does not arise.

Clause 14

122 The question here was whether clause 14 is an expression of wishes and, if not, I am asked whether it imposes a trust limiting what would otherwise be absolute gifts and, if so, I am asked to identify the terms of any trust. I am also asked if any such trust applies to the gift under clause 13. The claimant, acting in a representative capacity for the unborn persons that might be interested, argued that clause 14 did create a trust and the children argued that it did not. The claimant rightly acknowledged that there was no express reference to a trust and also that this would not be determinative. The case could be put at its highest on the basis that the testator's express wording stated that "my freehold and long leasehold of subject properties must be passed on" since this was mandatory language. However, these words cannot be looked at in isolation as is made clear in *Marley*. The children correctly submitted that the express language suggested that the clause was intended as an expression of wishes rather than with the view to setting up a trust. In particular, the testator used the terms "wherever is possible" and "seriously hope". This makes clear that it was an expression of wishes.

123 It is not necessary to decide the claimant's suggestion that the wording was sufficient to impose a trust, not only over freehold or leasehold properties, but also over undivided interests in land under a trust of land, together with foreign land and corporate interests. However, the ordinary meaning of leasehold and freehold would not ordinarily cover foreign interests in land or shareholdings, especially if construed from the armchair of a testator who is in the UK property business and held property overseas. The fact that the potential subject matter of the trust and its terms had not been identified was relevant.

124 From the claimant's evidence, it appeared that the only property that belonged to the testator in 2016 that could fall to be covered by the clause if foreign or corporate interests were excluded but shared ownership was covered was the testator's 50 per cent share in Cypress House worth around £170,000. This is a relevant consideration, although not decisive. Similarly, the lack of clarity as to how the interest could be passed on to each grandchild at 25 but preserved for others showed a lack of intention to create obligations under a trust. As a matter of common sense, the testator's instructions as to the passing of this type of property are more consistent with him expressing a wish to his children to pass the property to their children when adults wherever possible rather than imposing a trust in favour of grandchildren that would require administration over many years and also entail substantial cost. I am satisfied that the wording of clause 14 did not impose a trust limiting what would otherwise be absolute gifts of interests in freehold and long leasehold properties under clauses 12 and 13 or the testator's interest in Cypress House. The wording only takes effect as an expression of wishes.

Clause 16: chattels

125 Here the issues were first as to whether clause 16 was to be correctly construed as a gift of the deceased's personal chattels within the meaning of section 3 of the Inheritance and Trustees Powers Act 2014, and how the provisions were to apply, whether the chattels were to be distributed in accordance with any agreement, and whether if, for any reason, the said property could not be distributed in accordance with any agreement, how it should be distributed.

126 I am satisfied the answer to the first question is "yes". Clause 16 was obviously a gift of personal effects and on its ordinary meaning, this comes within the meaning of section 3 of the Inheritance and Trustees Powers Act 2014. This was not challenged by any party as it was the clear effect of the gift. I accept the adult children's submission that clause 16 was a specific gift of the testator's personal chattels to be divided between his children by agreement or, subject to that, at the discretion of the executors.

127 The claimant had raised a question as to the validity of clause 17 under which the testator had purported to tie up ownership of a Gary Hume painting for 50 years pending sale and equal distribution of the proceeds to the testator's grandchildren. The claimant had correctly conceded that this was ineffective as a gift. I accept that, in those circumstances, the painting was covered by clause 16. The fact that the testator's chattels had been sold following his death, except for a gun that had been mentioned in the manuscript note and the Gary Hume painting, does not mean that the proceeds are not subject to the gift in clause 16.

128 It is relevant that Rafferty is a minor and lacks capacity to conclude an agreement regarding the chattels that would discharge the other children. However, his litigation friend may, on his behalf, agree to how the chattels or their proceeds are to be dealt with and this can be regarded as the compromise of claims under the will in respect of chattels. The court has power under CPR 21 to approve such a compromise. I hope that the parties can put forward any agreement in the order so that it can be considered and approved if appropriate.

ADDENDUM ON INTEREST DATED 1 JULY 2021

The issue on interest on costs

129 Following judgment the parties took some time to put forward a draft order. It was agreed that the claimant and defendants should have an order that their costs be paid out of the estate in the due course of administration and that such costs to be subject to detailed assessment on the indemnity basis if not agreed. It was common ground that this was the usual order in an application made under CPR 64 asking the court to construe a will, namely that the beneficiaries' costs are, by analogy with the personal representative's right of indemnity, to be paid out of the estate, and fell within the *Buckton 1* category, from *Re Buckton* [1907] 2 Ch 406.

130 There was a dispute as to whether interest should be awarded on the defendants' costs and written submissions were exchanged.

The parties' positions

131 The second and ninth defendants claimed that they should be paid interest on costs at the judgment rate of 8% from 1 July 2021. Initially the defendants relied on the Judgements Act 1838 ("the Judgments Act"), *Involnert Management v Aprilgrange Ltd* [2015] EWHC 2834 (Comm) and CPR 40.8.2. They later accepted that the Judgments Act does not apply. They

rely on the court's equitable jurisdiction, as seen where the court awards interests on debts and legacies following the taking of an account under CPR 40 PD-A paras 14-15. They say that the obligation to pay arises because of the fiduciary status of the administrator meaning that they should not be entitled to profit from retention of money. The administrator is therefore chargeable with the interest that they earned, or should have earned (or are estopped from denying that they earned). The basis of this practice can be seen in cases where a trustee is required to pay interest on funds that are wrongfully retained (*AG v Alford* (1855) 43 ER 737 at p 851, *Williams Mortimer & Sunnucks on Executors* at 52-54 to 52-59).

132 The second and ninth defendants say that the intention of the costs order is that the parties are indemnified as to their costs, the rationale being that they were put to those costs by the actions of the testator in failing to express his testamentary intentions with clarity. They submit that on past experience there is likely to be substantial delay in distribution of assets and they will be prejudiced if there is no award of interest.

133 The claimant took a neutral view on the recovery of interest.

134 The third to eighth defendants objected because they contended the court had no jurisdiction to award interest. They argue that this form of costs order is an order for payment from a fund and does not therefore attract interest under the Judgments Act or otherwise because it is not an *inter partes* costs order in adversarial litigation: *Attorney-General v Nethercote* (1841) 11 SIM 529; *In re Marsden's Estate* (1889) 40 Ch D 475; *Wills v Crown Estate Commissioners* [2003] EWHC 1718 (Ch); White Book 2021, Vol. 1, 47.19.1; *Friston on Costs (3rd Ed.)*, 56.112-113; *Civil Costs (6th Ed.)*, 19-007). They also say that the interest would operate to the detriment of the beneficiaries since there is insufficient cash available in the estate to pay the costs at present.

135 The third to eighth Defendants say that the court's equitable jurisdiction does not arise since it applies where a fiduciary withholds money from a beneficiary or profits from their position and is consequently charged with interest for their default. Here any interest awarded would fall on the estate - which in practice means the beneficiaries, and not the fiduciary. The beneficiaries have no direct control over the administration. The eighth defendant also says that Rafferty is a minor who has taken no part.

136 The alternative case of the Eighth Defendant was that interest should be awarded to all the Defendants but only at 0.1% (as the rate awarded on funds in the court's Special Account) or 1% over the base rate since this reflected the modern application of the authorities as explained in *Williams Mortimer & Sunnucks* at 52-56.

The applicable law

137 The Judgments Act 1838 provides that:

> *"17. Every judgment debt shall carry interest at the rate of [] pounds per centum per annum from [such time as shall be prescribed by rules of court] . . . until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment.*
>
> *…*
>
> ***18 Decrees and orders of courts of equity, &c. to have effect of judgments.***
>
> *All decrees and orders of courts of equity, and all rules of courts of common law …. whereby any sum of money, or any costs, charges, or expences, shall be payable to any person, shall have the effect of judgments in the superior courts of common law, and the persons to whom any such monies, or costs, charges, or expences, shall be payable, shall be deemed judgment*

creditors within the meaning of this Act; and all powers hereby given to the judges of the superior courts of common law with respect to matters depending in the same courts shall and may be exercised by courts of equity with respect to matters therein depending . . . and all remedies hereby given to judgment creditors are in like manner given to persons to whom any monies, or costs, charges, or expences, are by such orders or rules respectively directed to be paid."

138 *AG v Nethercote* (1841) 11 SIM 529 dealt with a costs order in proceedings relating to a charity under which the Judgments Act was put forward to justify the award of interest. The Vice-Chancellor, Shadwell VC's judgment was reported as:

"the section of the Act referred to [both sections 17 and 18 of the Judgments Act] *seemed to him to relate to those cases in which one party was directed to pay costs to another party, and not to cases in which costs were directed to be paid out of an estate".*

139 In *Re Marsden's Estate* (1889) 40 Ch D 475 Chitty J was dealing with whether interest was recoverable on costs awarded under an earlier order made on taxation following an action for administration of an estate. He did not conclude that the court had no jurisdiction to award interest on such costs, but instead made clear that interest would not accrue "without special direction".

"But it is plain that the sections of the Judgment Act and the orders have no reference to the payment of costs directed to be paid out of a fund. Without relying on Attorney General v Nethercote decided in January 1841, this has been the constant practice; and where the fund is in the hands of the Paymaster-General he is not at liberty to make any payment of interest unless there is a direction to that effect in the order. In that case the order is for taxation and payment of the costs by the trustees out of a particular fund, and there is no ground for saying that anything more than the amount of the taxed costs should be paid. If any interest was to be paid by the trustees the order ought to have directed it. In special circumstances such a direction might have been given, but the order is silent in that respect.
…Whether interest on a portion of the costs might or might not be allowed is a matter of doubt, but it is now too late to raise the question and attempt to sever the costs."

140 The reference by Chitty J to a special direction and the interest on a portion of interest referred to arguments relating to interest said to be recoverable under two separate statutes (the Solicitors Act 1860 and the Solicitors Remuneration Act 1881). Counsel for the third to eighth defendants correctly pointed out that these statues have been repealed. It is unlikely that solicitors' rights to remuneration were lost in the replacement legislation but I need not explore that since the claim for interest is not made under legislation relating to solicitors.

141 In *Wills v Crown Estate Commissioners* [2003] EWHC 1718 Peter Smith J decided an appeal relating to whether interest was recoverable on an order for costs in a Tomlin order. He found that *"whenever there are funds out of which costs are paid, there is not an order which attracts interest. The reason for that is that there is not an order of court in adversarial litigation"*. Further, the provision for costs was in a Tomlin order so did not form part of a judgment for the purpose of the Judgements Act, and it was for the parties to provide for interest.

142 The White Book says:

"Following the decision in AG v Nethercote [1841] 11 Sim 529 and Re Marsden's Estate (1889) L.R. 40 Ch. D. 475 it is quite clear that whenever there are funds out of which costs

are to be paid there is not an order which attracts interest. The reason for that is that there is not an order of the court in adversarial litigation. In the case of a Tomlin Order the provisions as to payment of costs in the schedule do not fall within the Judgments Act. On the facts of the case there was a contractual agreement between the parties and if interest was to be payable it should have been expressly included or excluded: Wills v Crown Estate Commissioners [2003] EWHC 1718 (Ch), Peter Smith J."

Conclusions

143 The authorities relied upon by the third to eighth defendants make clear that interest is not recoverable under the Judgments Act on orders for costs paid out of an estate. The reason given, namely that the order is not made in adversarial litigation, is a somewhat unattractive explanation where the proceedings involved a 5-day hearing involving argument by numerous counsel. However, the application of the Judgments Act is now well established so interest cannot be awarded under that statute. The second and ninth defendants also invoked CPR 40.8 but this cannot assist since it is also concerned with payment of judgment debts.

144 It was common ground that the rationale for the award of costs to the Defendants was under *Re Buckton* (or by analogy with it). The claimant and defendants have been put to those costs by the actions of the testator in failing to express his testamentary intentions with clarity. This (and the award of indemnity costs) would suggest that the parties should be indemnified against the cost of having to take part, including the cost of being out of money. However, I also take into account that the defendants benefit from the approach in *Re Buckton* in not being exposed to an adverse costs order in the same manner as ordinary litigation.

145 The court clearly has an equitable jurisdiction to order an executor to pay interest on the basis of preventing unjust enrichment at the expense of the beneficiaries of a trust (*AG v Alford).* It also has jurisdiction to award interest on the taking of an account under PD 40A, including allowing interest at the judgment rate on administration expenses. It is also relevant that monies in the estate will be accruing interest (although currently at a low rate), and other assets in the estate may also be increasing in value. Beneficiaries of those assets will have the benefit of those increases, so that delay in the administration would unequally prejudice some defendants to the advantage of others (as is apparent from this dispute). There is a real likelihood that in the absence of any interest, delay in concluding the administration will mean that the defendants will not be properly indemnified against their costs, and some will be left more out of pocket than others.

146 The approach in *Re Buckton* suggests that the purpose of the costs order is to indemnify the defendants for their costs so far as possible. An award of interest would protect against delay depriving the defendants (or some of them) of the benefit of the costs order. The non-adversarial nature of the proceedings does not justify the refusal of interest. However, the ordinary judgment rate is not applicable, and the purpose of the interest under the equitable jurisdiction does not ordinarily cover the cost of unsecured borrowing (which would ordinarily be compound interest, and probably well in excess of 3% on current rates), although it may reflect the purpose of indemnifying the person to whom costs are to be paid.

147 I am satisfied that interest on costs should be awarded to all the defendants under the court's equitable jurisdiction. While the jurisdiction to award interest is not based on the cost of borrowing, the principles underlying *Re Buckton* assume that the parties have had to finance the litigation in some way. This will entail not only the costs themselves but also bank interest that might have been earned, and also a high likelihood that interest charges have been incurred (whether on the solicitors' bill or on an overdraft).

148 Allowing 0.1% or the base rate (or even the base rate plus 1%) would not be a fair rate of interest where the defendants have reasonably been obliged to incur the costs in question, and fall within *Buckton 1*. The cases referred to by the eighth defendant in *Williams Mortimer & Sunnucks* where the Special Account rates were applied (e.g. *Re Evans* [1999] 2 All ER 777) involved much higher actual rates and are distinguishable since the defendants are not mere legatees but fall within the category entitled to be indemnified under *Re Buckton*. Allowing a rate that falls between the interest that might be earned by the estate or the litigant, and the cost of borrowing the same sum reflects the broad purpose of indemnifying the recipient. Simple interest at 2% would meet that standard.

149 The other cases relied upon by the third to eighth defendants do not support the argument that there is no jurisdiction to award costs awarded out of an estate. *AG v Nethercote* and *In Re Marsden's Estate* support the proposition that interest is not recoverable under the Judgments Act but do not address the court's equitable jurisdiction. Similarly, *Wills v Crown Estate Commissioners* is distinguishable. Peter Smith J was addressing the issue of the scope of the Judgments Acts and concluded that the master had wrongly decided that *AG v Nethercote* was confined to the administration of estates. His decision was also based on the costs being part of a Tomlin order so the case is further distinguishable. The commentary in the White Book does not fully reflect the court's jurisdiction outside the Judgments Act.

150 Accordingly I award interest on the costs awarded to all defendants from 1 July 2021 at the rate of 2% per annum.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This Judgment has been approved by the Judge