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IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS IN BRISTOL

PROPERTY TRUSTS AND PROBATE LIST (Ch. D)

Heard on 7, 8 September 2022
Judgment given on 3 October 2022

Before Mr. Recorder Leslie Blohm KC

Between :

	CHRISTINE HAWKEN	**Claimant**
	- and -	
	(1) GEOFFREY RONALD JELBERT **(2) PATRICK MICHAEL GASKINS**	**Defendants**

Representation

For the Claimant:	Mr John Dickinson (instructed by Stephens Scown LLP Solicitors)
The First Defendant:	Appeared in person
The Second Defendant:	Did not appear and was not represented

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JUDGMENT

1. This claim concerns the meaning a gift by clause 3 of the will dated 14 November 2014 of Ronald James Jelbert ('the deceased') where he devised:

> "…free of tax all my interest in the property known as Ponsandane Meadow Chyandour Penzance Cornwall TR18 3NH as shown for identification purposes on the plan attached shaded red with the right of access at all times and for all purposes therein to Christine Hawken absolutely."

2. Ms. Hawken is the claimant. She was the deceased's partner for many years from the mid 1970s until his death on 22 November 2014. She contends that the gift bequeaths to her not only a house within a walled garden, but also an adjacent area used for parking vehicles and rubbish bins, which I shall call the 'turning and parking area' and also part of a driveway leading to that area from the public highway. If the bequest does not convey this land, Ms. Hawken contends that the will should be rectified under section 20 Administration of Justice Act 1981 so as to direct such a bequest. In the alternative she says that she is entitled to all of that land by reason of the operation of the doctrine of proprietary estoppel, and further or in the further alternative she claims vehicular rights of access and parking and other service rights over the drive and the parking area. She was represented by Mr. John Dickinson of counsel, instructed by Stephens Scown LLP.

3. Mr. Geoffrey Jelbert is the deceased's son and one of his four children. In the events which have happened he is entitled to the entirety of the residuary estate of the deceased. He maintains that the bequest, insofar as it conveyed land, related solely to the land falling within the former walled garden. He does not accept that the gift conveyed vehicular rights of access to Ponsandane Meadow, but says he is willing to negotiate such access with Ms. Hawken. Mr. Jelbert represented himself in person before me.

4. By his last will the deceased appointed his four children, Geoffrey, Roger, and Ernest Jelbert and Georgina Harris as his executors and trustees. By clause 3 he bequeathed the property in dispute to Ms. Hawken in the terms stated above. By clause 4 he gave Ms. Hawken £50,000 free of tax. By clause 5 he gave Ms. Hawken various domestic items. The residuary estate was bequeathed to his four children in equal shares.

5. Probate of the deceased's estate was granted to Mr. Geoffrey Jelbert on 27 July 2016. Roger Jelbert and Sarah Harris were appointed as executors under a double grant of

probate made on 15 January 2017. Mr. Ernest Jelbert was appointed as executor by a further double grant of probate made on 2 August 2017.

6. Litigation relating to the four siblings' entitlement under the will was settled by a Tomlin Order made by HHJ Cotter QC on 3 September 2018. Under that order and by subsequent agreement with Ernest Jelbert Roger Jelbert and Sarah Harris were removed as executors, and the siblings agreed that Mr. Geoffrey Jelbert became entitled to the entirety of the residue of the estate; he agreed to make payment of an agreed sum to each of his siblings.

7. In the course of this litigation the court has ordered that Geoffrey and Ernest Jelbert be removed as executors of the deceased's will, and substituted Mr. Patrick Gaskins. Mr. Gaskins has elected not to participate actively in this litigation, but has indicated that he is content to abide by the decision of the court as to the true meaning of the bequest, and to execute the will accordingly.

8. Much of the background to the claim is common ground. The deceased was the owner of and lived with Ms Hawken in their bungalow at Ponsandane Gardens, Chyandour, which was registered at HM Land Registry under title number CL95115. I understand that in former times this was land that was ancillary to a grand Edwardian House situated opposite across the B3311, Ponsandane House. Prior to 2010 it had two properties on it; Ponsandane Gardens itself which was a bungalow constructed by the deceased, and Little Ponsandane which was a property constructed by the deceased for his mother to live in. On the south of a plot was an historic walled garden, and it is within the confines of this walled garden that the bungalow at Ponsandane Meadow has been built. Access to both properties, Ponsandane Gardens and Little Ponsansdane, was by way of a driveway off of the B3311 at the very north of Ponsandane Gardens, and thus as far from the walled garden as could be.

9. In recent years the A30 has been improved at Chyandour, and this has involved the construction of the Penzance by-pass, part of which is a flyover that sails over part of Ponsandane Gardens. That flyover is situated just to the north of the walled garden, and the turning and parking area is substantially underneath it and to the north west of the walled garden. Immediately to the north of the walled garden the A30 is embanked and rather higher than the ground level for the walled garden. Once the

A30 was constructed, the only way of passing directly between the walled garden and the B3311 was to pass under the A30, and across what is now the turning and parking area.

10. In 2007 the deceased applied for planning permission for the construction of a bungalow on the walled garden. His intention was to move into this bungalow with Ms. Hawken when it was constructed. Outline planning permission was granted after an appeal in 2008. The deceased then applied for detailed planning permission. That application and the accompanying documentation has loomed large in the Claimant's argument as to the construction of Clause 3 of the will, and it is necessary to refer to the documents in a little detail.

11. The application incorporates various plans. One is a 1/1250 scale Ordnance Survey plan which showed the site edged in red. That area comprised the walled garden, the turning and parking area and most of the access route which meandered from the parking area around the bungalow Ponsandane Gardens, between that bungalow and Little Ponsandane, before it reached a stub of driveway leading from the B3311. That stub of driveway was not shown edged in red.

12. This land edged red was drawn over and across the route of the A30. Ponsandane Gardens itself was shown edged in blue, although that edging excluded the land edged in red and insofar as Ponsandane Gardens other than the land edged red was under the A30, that was not edged in blue. Also edged in blue was a parcel of land abutting the walled garden to the west, but this was not part of the registered title. I heard from Mr. Roger Jelbert that this plot, which I understand to have historically been used for growing vegetables, had been part of Ponsandane Gardens, but had been transferred to a company controlled by Mr. Roger Jelbert known as Startmate Ltd. Prior to the death of the deceased he asked Roger if he would transfer this plot to Ms. Hawken, and Roger has in fact done so. This appeared to concern Mr. Geoffrey Jelbert, but it appears to me to be of no relevance to the issue I have to decide. Returning to the planning application, it appears from looking at the plans in their entirety that the deceased intended to construct the turning and parking area under the whole width of the A30 flyover. However the location plan and the block plan only showed it as extending half the width of the A30, from the walled garden.

13. The application incorporated a 1/200 scale 'block plan' which showed the site in plan view. Insofar as it showed the parking area as part of the plan (in the top right hand corner of the plan) it did not show its bottom or western boundary. The reason for that appears to be that the site for planning purposes included the substantial part of the drive which led from the turning and parking area, as is apparent from the location plan, and the 1/500 scale block plan. The block plan also showed the location for the recycling bins being on the turning and parking area.

14. In respect of the present application the Planning Design and Access Statement stated that

> *"The driveway and parking facility within the site boundary will enable disabled persons to alight from a vehicle and gain access to the main entrance by a level approach. The surface of the approach will be firm and either brick pavers, paving slabs or other suitable material…"*

15. The Council was concerned that vehicles that accessed the property had space to turn around so that they both left and entered the B3311 going forwards. The deceased's agent amended the plan to the application to reduce the parking spaces to one disabled space and one parking space, thus freeing up other space on the turning and parking area.

16. Conditional planning permission was granted on 19 July 2010. One of the conditions provided as follows:

> "2. The development hereby permitted shall not be used or occupied until areas have been provided within the site for vehicles to be parked and to enable them to enter and leave the site in forward gear in accordance with the approved plan. These areas shall not thereafter be obstructed or used for any purpose other than the parking and turning of vehicles. Reason: To ensure the provision of off-highway parking, in the interests of highway safety."

17. Condition 5 required the applicant to provide details of hard landscaping works to be submitted and approved before the commencement of works. The deceased's agent submitted two plans the first showing that the brick paviour surfacing surrounded the bungalow and extended a little way outside of the garden wall, whilst the turning and parking area was shown surfaced with granite chippings. The second showed the

existing brick wall being retained to the north, with stone walls to the east and west and a stone-faced Cornish hedge to the south.

18. The building and the works to the turning and parking area were carried out starting in 2010 or 2011. The turning and parking area appears to extend under the full width of the A30 from the photographs I have seen, or if not the full width then close to it. In fact the property was not built in accordance with the planning consent, concrete slabs being used rather than brick paviours but the location was the same. The pedestrian area shown outside of the access way to the walled garden and leading to the turning and parking area was shown surfaced in brick paviour as well. As constructed it was surfaced with granite chippings as was the turning and parking area. Structural building works started in Spring 2011 and was completed in September 2014. Sadly, the deceased never moved in to Ponsandane Meadow. The Claimant moved in in September 2015.

19. The work was wholly funded by Ms. Hawken. She pleaded that she funded the work by utilising her half share in property in Florida that she owned with the deceased and which they had sold. Mr. Jelbert in his Defence did not admit the expenditure alleged; but he did not in fact challenge the evidence that she had spent some £150,000 on the work, and I find as a fact that she did fund the entirety of the work in that sum.

20. I turn next to the representations made by the deceased to Ms. Hawken prior to the work being carried out. According to the Claimant the deceased agreed that he would transfer the site of Ponsandane Meadow to the Claimant and she would fund the building works. He did not expressly define the extent of Ponsandane Meadow as including or excluding the turning and parking area or the drive. It is the Claimant's case that what was meant, and what she understood to have been meant, having been party to the planning application, was the land enclosed by the red line on the planning application.

21. The deceased had previously executed a will dated 21 February 2002 by which he left Little Ponsandane to the Claimant. Little Ponsandane was a bungalow and was accessed from the driveway leading from the B3311. It contained a car parking area within the driveway contained within Little Ponsandane.

22. The deceased executed a further will on 11 March 2014, followed by his last will dated 14 November 2014. These two wills were identical save that the will of 14 November 2014 contained a further bequest of £50,000 to Ms. Hawken, and also specific wishes for his funeral.

23. The will was signed by the deceased and witnessed by Mrs. Southwell and her personal assistant, whose full name is not legible. The plan referred to in clause 3 is signed by the deceased and it would appear the two witnesses. The plan is based on the Land Registry Index Map Plan, Ordnance Survey at 1:1250. The plan shows Ponsardane Gardens shaded to the North of the A30 with the exception of Little Ponsandane. The land in the location of the walled garden to the South of the A30 is shown shaded in red. No land is shown shaded insofar as it lies under the A30. The driveway leading from the walled garden is not shown shaded at all.

24. A substantial part of the trial was taken up with a consideration of the genesis of the wills and the drafting process adopted.

25. The deceased attended local solicitors, Messrs. Coodes in 2013 and was seen by Ms. Louise Southwell. He indicated that he wished to transfer the house that was being built to Ms. Hawken, and Ms. Southwell asked the deceased to specify the extent of the land he wished to transfer in the following terms, according to Ms Southwell's attendance note of 26 November 2013:

    > "He says that his partner Christine is building a house within the curtilage of this land which he says he will convey to her once completed…."

26. In December 2013 at Ms. Southwell's further prompting the deceased supplied a plan (the '3 metre strip plan'). That plan appears to show the extent of Ponsandane Gardens to the North of the A30, and so did not answer Ms. Southwell's question and is of no direct assistance in considering what the deceased intended to convey.

27. Ms. Southwell attended on the deceased at her office on 11 March 2014. Her attendance note states:

    > *"Clause 3 to leave the land which he is now calling Ponsandane Meadow, which is within his curtilage and is shown on the plan attached to the will, with right of access at all times and for all purposes to [Ms. Hawken]…."*

28. One oddity has concerned a plan produced by Mr. Jelbert in the fortnight before the trial, which I call Plan D1. It is a Land Registry plan showing the various Ponsandane properties. The base plan itself is a black and white photocopy of a Land Registry plan obtained by Mrs. Southwell for the purpose of showing the location of the clause 3 gift. It has an area either side of the A30 and abutting the walled garden hatched in ballpoint pen, and handwritten in the bottom margin are the words 'Lease to C. Hawken Peppercorn Rent'. Mr. Dickinson objected to the admission of the document in evidence. I deal with the origin and effect of Plan D1 below.

29. I have heard from Ms. Hawken, Mr. John Roberts and Mr. Roger Jelbert on behalf of the Claimants. I accept their evidence as being honest and truthful. Mr. Geoffrey Jelbert gave evidence on his own account. However it is plain to me that he has taken this dispute, and indeed a number of disputes with Ms. Hawken and his siblings, very personally. It would be difficult for any litigant to remain objective in these circumstances, and Mr. Jelbert has not. Specifically, I have had to consider the genesis of Plan D1. For the reasons that I set out below I do not accept that this plan is a genuine document created by the deceased. I am particularly cautious before accepting Mr. Jelbert's evidence, where there is dispute, as being accurate.

30. Mrs. Hawken told me that the deceased had suggested building a bungalow on the walled garden, which had excellent views over the sea to the south. They had agreed that he would provide the land, she would fund the construction and he would transfer it to her. They agreed this because by 2008 his health was deteriorating, and he was likely to die first. Ms. Hawken recalled seeing the Planning Design and Access Statements, but she was not involved in the planning process. Prior to the construction of the bungalow they used the walled garden for growing flowers and vegetables which the deceased sold. They would park in what is now the turning and parking area; there was no vehicular access on to the walled garden itself. The project was funded at a cost of £150,000 by Ms. Hawken. She and the deceased had owned a holiday home in Florida which they had sold. She used her share of the money to pay for the works. She said that she always believed that the parking area would be part of Ponsandane Meadow, and spent £800 on block paving to go down on to that area.

31. In the days prior to his death the deceased asked Mr. Jelbert to take him to a garden centre where he bought plants for hedging purposes, and had them planted adjacent to the driveway. Not all of the driveway was so bordered; according to Mrs. Hawken it was the southerly part closest to her bungalow.

32. Ms. Hawken moved into the bungalow at Ponsandane Meadow after it was constructed in September 2015. She parks her vehicle in the parking area and walks to the building. She agreed that the deceased was experienced in the sale of property and had bought and sold property throughout his life. She said that it was she who had coined the name 'Ponsandane Meadow' for the property.

33. She was present when the solicitor attended on the deceased for him to execute his last will. She was aware that she would be receiving Ponsandane Meadow, but did not see the plan attached to the will until after the death of the deceased.

34. She did not know anything about the option agreement with Startmate Enterprises. She accepted that the drive was located 1 metre from the boundary fence.

35. Mr. John Roberts is the claimant's husband; they married in 2019. He was a widower, and he and his first wife were friendly with the deceased and Ms. Hawken. When visiting Ponsandane Gardens the deceased would take him to see the on-going building works, and showed him Ponsandane Meadows and its full residential curtilage and their car parking facilities. At one time he told Mr. Roberts that he might move into Ponsandane Meadow and let Ponsandane Gardens out, and that he would be taking steps to separate the driveway from the rest of the gardens to give privacy between properties. He agreed that the deceased had never expressly said that he would transfer the freehold of the car parking area to the Claimant.

36. Mr. Roger Jelbert is Mr. Jelbert's brother. He acted as project manager for the construction works on site. The builders used to park under the flyover and wheel their materials into the walled garden area by hand or cart. He surfaced the driveway with gravel. He was horrified to hear that his brother was denying Ms. Hawken's entitlement to vehicular access and parking; his father had told him to ensure that Ms. Hawken was looked after, after his death. He also explained the background to the Promotion Agreement, and that he had gratuitously transferred some land to the west

of Ponsandane Meadow to Ms. Hawken because this had been the wish of the deceased.

37. The court in construing the meaning of a will is seeking to ascertain the intention of the testator by interpreting the words used in their documentary and factual context, having regard to all relevant matters of fact save direct evidence of the testator's subjective intention (see *Marley v Rawlings* [2015] AC 129 at [23] per Lord Neuberger). If the court concludes that the provision is ambiguous, either on its face or in the light of evidence other than that of the testator's intention, then it may have recourse to any evidence including direct evidence of the testator's subjective intention in respect of the ambiguous provision – section 21 Administration of Justice Act 1982.

38. The dispute in respect of clause 3 concerns the extent of the land that is the subject of the bequest.

39. The clause identifies the land in two ways; as 'the property known as Ponsandane Meadow Chyandour Penzance Cornwall TR18 3NH' and also as the property 'as shown for identification purposes on the plan attached shaded red'. The plan attached is an Ordnance Survey plan of Ponsandane Gardens in 1/1250 scale which shows the walled garden shaded in red. The walled garden is shown as a distinct and delineated area on the base plan, and that parcel of land has been shaded. This description is clear and straightforward; the plan is entirely consistent with Mr. Jelbert's view of the meaning of the clause.

40. The other description for the property is that it is 'known as Ponsandane Meadow'. Where property is described as 'known as' a particular label, the court will have regard to all relevant facts to ascertain the extent of the land covered by the description - see *Freegard v Rogers* [1969] 1 WLR 375 at 381E-H per Peter Gibson LJ. Where it is a conveyance that is being construed, the court asks the question 'what is the extent of the land that a purchaser would have considered that he was buying by that description?'. The equivalent question for the construction of a bequest of land in a will is 'what would an objective person in the position of the testator at the moment of his death have considered that he was giving?'. This is consistent with the

'armchair principle' in respect of will construction. One asks what a reasonable person in the position of the deceased, 'knew as' Ponsandane Meadow.

41. In the present case the extent of Ponsandane Meadow was not, otherwise than may have been the case in the last will, expressly defined by the deceased. As a building, and as a self-contained unit of occupation it had not been in existence for any substantial period prior to the death of the deceased.

42. Mr. Dickinson relied on the planning material relating to the development of the land to justify the inclusion of the parking and turning area and the driveway within the description. He relies first on the general reference to 'the site' as falling within the red edging on the plans for the application for detailed planning permission, and secondly on the conditions imposed by the local planning authority in the grant of planning permission. I do not consider that these matters bear the entirety of the weight that Mr. Dickinson places on them. The obligation to delineate a site, edged in red, in a planning application flows from the applicant's obligation to specify the land that it subject to development. It therefore shows that the land is the subject of building works or an application for a change of use – see section 62 Town and Country Planning Act 1990 and Art 7(1)(c)(i) The Town and Country Planning (Development Management Procedure) (England) Order 2015, and that the construction of the bungalow and the turning and parking area and the driveway is part of a single development. But it does no more than that. Whether a turning or parking area or a driveway that is to be created is to be part of the property itself, or to be land over which ancillary rights are to be granted, is not something that the red line delineation indicates.

43. The conditions imposed by the planning consent require the provision of parking spaces, and for the turning and parking area to be kept unobstructed and used only for vehicular turning and parking. The presence of a planning obligation may be a material consideration in assessing whether a testator intended to convey the freehold title to land, ancillary rights over it, or no rights at all. The obligation not to obstruct the parking and turning area is one that can be satisfied by the owner of the land; it is likely that the testator would have intended the owner of the bungalow at Ponsandane

Meadow to have acquired control of the parking and turning area sufficient to comply with that obligation.

44. The Design and Access Statement that was submitted and approved showed the area within the walled garden and a small pedestrian area outside of it to be laid to brick paviours or concrete slabs, which indicates an apparent unity. In fact it appears from the photographs that the concrete slabs were only laid as far as the doorway; the entirety of the turning and parking area was laid to gravel. However the plan is in my view some further indication that land outside of the walled garden was intended to go with the bungalow itself.

45. I turn next to the physical nature of the land. The bungalow within the walled garden is enclosed by a significant wall and other boundary features. There is no direct vehicular access on to the walled garden. The only access in fact to the public highway is via the drive. Ms. Hawken said that it would take about 10 minutes to walk. The turning and parking area is immediately adjacent to a pedestrian entrance through the walled garden. The turning and parking area is gravelled and has a hard surface. It would obviously be perceived as being for the use of the adjacent bungalow. Given its location it is not obvious that it was intended to be used with the retained part of Ponsandane Gardens, although I accept that it could be. As a matter of perception it is my view that a reasonable observer would consider that the parking and turning area was part of, and therefore known as, Ponsardane Meadow.

46. I am fortified in this view by the fact that Ms. Hawken paid for the building work, and was told that she would have Ponsandane Meadow. Anyone knowing those facts would think that Ms. Hawken would have what she paid for. Where the building works appeared to be significant, as I consider they would have been in the construction of the turning and parking area, then that is the land that an objective observer would consider the testator intended Ms. Hawken should have. To put it shortly, she paid for it; she would have expected to have it.

47. I turn next to the driveway. I do not consider that the ownership of this land, which runs between the turning and parking area to near but not reaching the B3311 falls within the description ‘land known as Ponsandane Meadow’. On the one hand the driveway appears to have been roughly gravelled, and hence paid for by Ms. Hawken.

As I have noted, the driveway is also substantially within the land edged red on the planning location and block plans for the application for outline planning permission; they thus give the appearance of being part of a whole. I also accept that the testator shortly before his death planted hedges which separated part of the claimed drive from Ponsandane Gardens.

48. Notwithstanding these matters I conclude that the testator did not intend to convey the drive within clause 3 of the will, for a number of reasons. First, as I have indicated, the plans annexed to the planning application are drawn for a different purpose, and so their assistance in this particular regard is limited. Secondly, it seems to me that if the extent of the drive shown within the red line on the planning documentation is conveyed out of the estate, there would be little purpose or sense in retaining a short stub of access way that is not conveyed within the terms of clause 3. If the testator intended to convey the driveway, one would have thought he would have conveyed it down to the B3311. Moreover the effect of conveying the claimed driveway would be to divide Ponsandane Gardens into two; the bequest reserves no rights over the driveway to the estate. Such a result might not be capricious, but it would be odd. Thirdly, if the driveway edged red is within the gift, the consequence is complexity as regards the retained land. It appears from Mrs. Hawken's evidence that both the vehicular access to Ponsandane Gardens and to Little Ponsandane would have to traverse the driveway that she is claiming. Fourthly, the hedges that were planted only extend part of the way down the driveway. Fifth, although the drive is gravelled it appears from the photograph not to be a substantial construction.

49. Sixth, I turn to a plan dated September 2013 referred to as 'the 3 metre plan'. Both Mr. Rogert Jelbert and Mr. Geoffrey Jelbert discussed this in evidence on the basis that (as Mr. Geoffrey Jelbert contended) it showed a strip of Ponsandane Gardens three metres wide on the eastern side of the title, closest to the B3311, which it was intended might be used to widen the road if a developer obtained planning permission to develop some land that formerly had been owned by the deceased, but was now owned by Startmate Enterprises Limited, and the subject of a promotion agreement. The relevance of this is that the driveway, which appears to be one vehicle's width, appears at one or more places to be located not more than a metre or a metre and a half from the boundary. This was the evidence of the witnesses, and not something

that has been measured on the ground. The point was that the testator would not have bequeathed the soil of the highway if there was a risk that the B3311 might be widened, the driveway taken and Ponsandane Meadow substantially landlocked.

50. In these circumstances it seems to me that there is a potential conflict between the verbal description of the property, which includes the turning and parking area, and the description of the property on the plan, which excluded it. I bear in mind that although I have for the reasons I have indicated come to the view that the description 'the property known as Ponsandane Meadow' includes the turning and parking areas but does not include the driveway, that is not the end of the matter. The extent of the bequest depends on the construction of the clause as a whole, and the plan referred to shows the walled garden as being coloured in, and not the turning area or driveway. Mr. Dickinson contends that the words and the plan are inconsistent, and that in the event of such an inconsistency where the plan is marked 'for identification' the words take precedence. However, he accepted, rightly I think, that where the wording itself was not absolutely clear, the court should have regard to the plan for such help as it could give to decide the true meaning of the bequest. That flows from the comment of Sir Peter Gibson in *Johnson v Shaw* [2003] EWCA Civ 894 at [35] where his Lordship said that

> "*It is well established that where the parties to a conveyance have used a verbal description of the parcels as well as a plan on which the property conveyed is delineated, they can specify whether the verbal description or the plan is to prevail in case of an inconsistency between them. If the delineation on the plan of the property to be conveyed is expressed to be for the purpose of identification only, the verbal description will prevail, though if that description is insufficient or leaves any uncertainty, the plan can be looked at for whatever assistance it can provide*".

Again, that approach is consistent with the requirement that a will, or indeed any document, be construed as a whole. It is not readily to be considered that any part of it is superfluous or mistaken. I bear in mind that although I have come to a view as to the meaning of the words 'known as Ponsandane Meadow' that is a view based on the totality of the evidence. It is, nonetheless, an ambiguous description.

51. In considering the weight to be given to the plan, Mr. Jelbert stressed that the plan itself is clear. It is an Ordnance Survey plan of a large enough scale to show plainly

what the deceased intended to convey, and what he did not intend to convey. Secondly, he asserts that the deceased was familiar with property transactions; both Ms. Hawken and Mr. Roger Jelbert agreed this was so. Therefore he was unlikely to have made a mistake in respect of the land shaded. Thirdly, the same plan was used in both the March and the November wills; it was unlikely that the same mistake was made twice. Fourthly, he was intimately knowledgeable of the land that was subject of the bequest.

52. Mr. Dickinson submitted that the deceased was unwell in the latter months of his life; but Ms. Southwell's attendance note of 27 October 2014 described him as *"appearing very well, lucid although much frailer than when [she] had last seen him"*. I note also Ms. Southwell's attendance note of the 14 November 2014 which said that: *"[The deceased] appeared extremely frail physically but mentally eloquent and alert."*

53. I do not think that there is any direct evidence that the deceased was in such a condition that he would have been unaware of the extent of the bequest on the land as shown on the plan. His stronger point was that the correspondence between the deceased and his solicitors that led to the drafting of the March will, and in particular the markings on the annexed plan, appeared to be somewhat chaotic, and indicated a failure on the part of the deceased to understand what he was being asked by his solicitors. The other point that is I consider material as far as the plan is concerned is that the turning and parking area lies in substantial part under the A30. If someone is shading the land to be transferred, it would be a little odd to shade the A30 itself. It seems possible that rather than do that the deceased might have shaded the main property alone. Indeed had the deceased shaded those parts of the turning and parking area not oversailed by the A30, this would have been equally misleading, That is to a degree speculation on my part, but it is based on what is shown on the ground and on the plans. So with this I turn to the evidence of the creation of the March will.

54. The deceased approached Messrs. Coodes, solicitors in Penzance to draft his will. Coodes had not acted for him before, and were not familiar with his estate or circumstances. The solicitor acting was Ms. Louise Southwell. I have not heard from Ms. Southwell; neither party sought to call her to give evidence, and I was not

informed of any reason why she could not have been so asked. That means that insofar as I am being asked to draw inferences from correspondence on the will file, which was put in evidence before me and which (for reasons that will become apparent below) I was obliged to call for and see the original that had been held by Coodes, I have not had the benefit of an explanation from the person best placed to give it. Neither Ms Southwell or Coodes are to be criticised for that, but where the file is not clear and I am asked to draw conclusions from the state of the file, it presents an obvious difficulty.

55. One point of potential significance relates to Ms. Southwell's attendance note of 11 March 2014, which I have referred to at paragraph 27 above. That gives the impression that Ms. Southwell believed that the plan annexed to the March 2014 will did show the extent of the land the deceased intended to bequeath. But that may reflect nothing more or less than Ms Southwell's view as to the meaning of the will as executed, and not reflect any discussion with the deceased or any independent basis for that belief. In the absence of evidence from Ms. Southwell I do not consider that this is material evidence in resolving the current dispute.

56. The other difficulty with the file concerned its production to the parties, plan D1, and the consequence of that. As I have noted, Mr. Jelbert relies on plan D1 as evidence of the deceased's intention not to bequeath the freehold of the turning and parking area to Ms Hawken, in that it shows that the land was to be conveyed on a leasehold basis only. Stephens Scown on behalf of the Claimant had previously sought a copy of the file. Mr. Jelbert consented to that, and a copy was produced to Stephens Scown. They did not at that time produce a copy to Mr. Jelbert. He then sought a copy by letter. The internal documentation within the file shows that Ms Southwell directed the production of a copy for collection by Mr. Jelbert, and that Mr. Jelbert subsequently collected that documentation.

57. When the parties were liaising to complete a bundle for the trial, Mr. Jelbert asked Stephens Scown to include a copy of a plan D1 which showed markings in ballpoint pen. During the trial Mr. Jelbert produced the original, which is plan D2. Plan D2 is now on the court file.

58. The base plan, which is a black and white photocopy appears to be a copy of a draft of the plan attached to the March and November wills. It is a copy of the draft because it does not appear to have been signed by the witnesses, as the plans attached to each of the wills have been signed. However it is a photocopy of that draft because it shows in black and white the shading that would have been apparent on the colour index map plan supplied to Coodes by the Land Registry in December 2013. It also shows the walled garden apparently coloured in, which indicates that someone has photocopied a draft of the plan supplied prior to execution of the will. Next, it has hatched in ballpoint pen the area between the walled garden and the southern edge of the flyover, and also a strip of land running the width of Ponsandane Gardens immediately to the north of the flyover and the retaining bank to the A30. Oddly, it also hatches what I think must be the northern part of the flyover itself, outside of the running carriageway. There is then handwritten in the bottom margin 'Lease to C Hawken Peper[illegible] rent'. The parties agreed that what was written in the margin was meant to be 'peppercorn rent'.

59. Mr. Jelbert contended that this map was produced by the deceased, and the writing was his. He gave evidence that it had been included in the bundle of documents that he had collected from Coodes as the will file. He had not supplied a copy to Stephens Scown because he assumed they had a copy in the copy file they had been sent. He said that the plan clearly indicated either that the deceased did not intend Ms. Hawken to have the freehold of the land outside the walled garden (because it contemplated giving her a lesser interest) or, if it had been created after the March will, that it was evidence that he considered that his will did not bequeath her the land outside of the walled garden. It would therefore be admissible under section 21.

60. Mr. Dickinson made three points in opposition. First, he contended that the document was inadmissible because it had not been disclosed properly; it had been disclosed late and in consequence the Claimant had not been able to examine the document forensically for its genuineness. Secondly, he disputed its provenance. The Claimant did not accept that the writing was the deceased's and neither did Mr. Roger Jelbert. Both gave evidence to that effect, although Ms Hawken did accept that the deceased's handwriting might have deteriorated due to his illness. Mr. Dickinson invited me to compare an accepted example of the deceased's signed handwriting on his annotation

of Coodes' letter of 5 December 2013 with the writing on plan D1 and to conclude for myself that handwriting was not the deceased's. He also submitted that the spelling of 'Hawken' appeared to have been a correction of 'Hawkin', and suggested that the deceased was unlikely to have made such a mistake; although Mr. Jelbert too had known her for many years, and a mistake on his part seems equally unlikely. Moreover, said Mr. Dickinson, Mr. Jelbert's account of the letter being in a copy of Coodes' will file was fanciful. His instructions were that the document was not genuine. Thirdly he contended that even if Plan D1 was genuine and admitted into evidence, it supported the Claimant's case by showing that the deceased was at one time minded to give Ms Hawken a possessory interest in the turning and parking area at virtually no rent.

61. It was in these circumstances that the original will file was sought from Coodes, and I inspected it. It showed little if anything of any materiality different from that which was in the trial bundle, but it did make it clear that the instructions Ms. Southwell gave were that the file was to be copied for Mr. Jelbert and the copy collected by him.

62. With this background I come to the following conclusions. First, as to admissibility, I do not consider that it was inadmissible because of a failure to comply with disclosure. The generic order for disclosure made in this case did not require Mr. Jelbert to disclose such documentation. A specific order made on the appointment of Mr. Gaskins as personal representative in the place of the defendants required Mr. Jelbert should supply to Mr. Gaskins all of the estate's documents that he had. If plan D1 is a document created by the deceased, it follows that it was the property of the estate, however it reached Mr. Jelbert. So he was in breach of that order. But the order did not provide expressly or by implication that a failure to disclose it barred reliance on it at trial, or that such a step would require relief from sanctions under CPR 3.9. CPR 31.21 provides that a party who fails to disclose a document or produce it for inspection may not rely on it at trial without the permission of the court. But the order for documents to be transferred to Mr. Gaskins was not an order for disclosure, but an order for the transfer of the deceased's property so that the substituted personal representative could administer the estate. I therefore conclude that Mr. Jelbert is not barred by breach of court order from relying on plan D1.

63. The next question is whether I should hold that the document was not admissible on the grounds of unfairness, or late disclosure. Mr. Dickinson's complaint here is essentially prejudice caused by an inability to have the document forensically examined. The claimant was aware that Mr. Jelbert was relying on plan D1 about 3 weeks before the trial. Mr. Jelbert's evidence is that he believed that the claimant already had a copy, provided to them with the copy will file by Coodes. There was no request or as far as I am aware any attempt to carry out a forensic analysis of the document. I cannot say whether or not it would have been practicable. No application to adjourn for that purpose was intimated or made. In the circumstances I am of the view that the document is admissible, for what it is worth. I now go on to consider that.

64. The genuineness of the document is in issue. The burden lies on Mr. Jelbert to show that the document was created by the deceased. Having considered the evidence I do not consider that Mr. Jelbert has discharged that burden, for the following reasons. First, I accept that evidence of Ms. Hawken and Mr. Roger Jelbert that the handwriting was not that of the deceased, over that of Mr. Jelbert that it was. Secondly, although I give this relatively little weight, in my view even making allowances for the deceased's illness the handwriting on D1 is dissimilar to that on the accepted sample of the deceased's handwriting. Thirdly, everything in Coodes' will file indicates that Mr. Jelbert was provided with a copy of the will file. There was no good reason for Coodes to have supplied him with an original, and every obvious reason why they would not have done. Fourthly, given that Stephens Scown were sent a copy of the will file before Mr. Jelbert, they would have received a copy of D1 had it been on the file. I accept that they did not. Fifthly, had Coodes supplied the original of D1 to Mr. Jelbert in error, it is likely that they would have kept a copy instead of the original. No such copy was on the file. Sixthly, there is no explanation as to how this document might have made its way from the deceased and on to the file. However, given that the correspondence between the deceased and Coodes may well be partial, I given this relatively little weight.

65. I have borne in mind that one possible inference which may be drawn from a finding that the deceased did not create this document, is that it is a false fabrication by Mr. Jelbert. Mr. Dickinson did not make this assertion, although he accepted that it would

be an obvious inference from such a finding (as indeed did Mr. Jelbert). That has given me pause. The court in general assumes that parties do not and would not behave in such a manner. But it must follow from the evidence I have heard and accepted and my inferences from it that I do not accept Mr. Jelbert's evidence that the document was collected from Coodes. Again, I stress that document D2 has not been forensically examined; that I have not heard from Ms. Southwell; and that I find against Mr. Jelbert on the civil standard of proof.

66. I therefore do not take plan D1 into account in construing clause 3 of the will.

67. My conclusion therefore is that clause 3 of the will is ambiguous in the light of other evidence, and that evidence of the intention of the deceased is admissible for the purpose of construing the extent of the freehold land conveyed. The description of the parcel being 'the property known as Ponsandane Meadow, Chyandour, Penzance, Cornwall TR18 3NH' was intended to mean both the area within the walled garden (and including the walls to the garden) and the turning and parking area, but not the drive leading from it to the B3311. Notwithstanding that the land conveyed was also shown on the plan as extending only to the area encompassed by the walled garden, that plan was attached 'for identification'. Considering the factual matters that led to the creation of Ponsandane Meadow, its funding, the relationship between Ms. Hawken and the deceased, and its physical state as at the death of the deceased, I conclude that the bequest included the turning and parking area, but not the drive.

68. Mr. Jelbert took the point that the physical extent of the turning and parking area as shown on the planning documents was a little less than its physical footprint. I understand that the work to construct the turning and parking area had been completed prior to the death of the deceased. In my view the land known as Ponsandane Meadow that the deceased intended to bequeath extended to the full extent of the gravelled turning and parking area that was constructed at the time of his death.

69. Had I taken plan D1 into account in construing the will. I would have concluded that it was probably created after the March 2014 will, it being likely that the plan was created shortly before execution of the will, and a copy either sent to or left with the deceased. As I have found that the deceased intended to give the freehold of the

turning and passing area to Ms. Hawken I would have had to have reconsidered that view in the light of plan D1. The difficulty that I have is that there is no documentation or indeed other evidence to indicate the purpose for which this document was created; whether it was provisional or certain, or whether it represented second thoughts. All that we know is that it was not reflected in the November will and that whilst it indicates that the deceased intended at some stage to transfer a possessory proprietary right to the turning and parking area at a nominal rent to Ms Hawken, and that right was not a freehold . Its existence would not have affected my final conclusion.

70. 19 February 2013 the deceased provided a note evidencing both Ms Hawken's expenditure and his wishes. It said:

> 'This is to confirm that the cost of building the new bungalow In the off-garden west of Ponsandane gardens has been Totally paid for by Miss C Hawken to be her residence A right of way for all times and purposes in front of the existing bungalow to access the new property'

This note is I consider clear evidence that the driveway was not to be conveyed to Ms Hawken, as it refers to a right of way in front of the existing bungalow. Bearing in mind the orientation of the Bungalow at Ponsandane Gardens, this is a clear reference to the driveway between the B3311 and the turning and access area. I have considered whether the reference to 'the cost of building the new bungalow in the off-garden' really indicates that the deceased only intended to convey the walled garden. But given that Ms. Hawken paid for everything, I consider that it is likely that the deceased was not considering as a matter of any consequence whether the turning and parking area was included, or not.

71. I turn next to the alternative claim of a vehicular right of way. The will grants a 'right of access at all times and for all purposes'. It does not specify whether the way is vehicular or not. By his defence Mr. Jelbert denies that the bequest is of a vehicular right of way, limiting it to a pedestrian way, although indicating a willingness to negotiate such a way. In his skeleton argument he accepted that the way extended to vehicles and did not argue before me that it did not. This was a realistic concession. It was in my view obvious that a vehicular right of way was intended. The way leading off the B3311 is suitable for vehicles; vehicles access Little Ponsandane and

Ponsandane Gardens; Ponsandane Meadow is a significant distance from the B3311 via the access way, and as a substantial residence one would expect to be able to drive up to it. There is no obvious parking short of the turning and parking area. The turning and parking area is an area to turn and park vehicles. The driveway is suitable for vehicles, and has been used by them when the property was being constructed, and indeed prior to that.

72. Mr. Dickinson argued, in the alternative to his contention that clause 3 bequeathed the turning and parking area, that in view of the terms of the planning permission and the location of the turning and parking area adjacent to Ponsandane Meadow the turning and parking area was not intended to be land for communal use, but land for the exclusive use of Ponsandane Meadow, both for parking and turning and for the storage of refuse bins. That was not I think a submission that only Ms. Hawken or the owner of Ponsandane Meadow could have such a right, but that no-one else could exercise any use of the turning and parking land which might interfere with such a right. In practical terms, that would amount to a right to sole use of the turning and parking area. There are difficulties with this submission, in that a right which amounts to exclusive possession of land cannot be an easement. These difficulties were not explored before me in submissions and in view of my conclusion as to the extent of the bequest I do not consider it further.

73. Mr. Dickinson pursued an alternative argument that the will should be rectified under the powers contained in section 20 Administration of Justice Act 1982. That provides:

> "20. Rectification.
>
> (1) If a court is satisfied that a will is so expressed that it fails to carry out the testator's intentions, in consequence —
>
> (a) of a clerical error; or
>
> (b) of a failure to understand his instructions,
>
> it may order that the will shall be rectified so as to carry out his intentions."

74. He also made an application to extend time for this application. Had I construed clause 3 as excluding the turning and parking area I would have extended the time for bringing the application. However I would have refused the application for

rectification. Ms Hawken's case was that the deceased committed a clerical error within s20(1)(a) when shading in the annexed plan so as to exclude the turning and parking area. It is right that such a self-penned error may be a 'clerical error' – see *Re Segelman* [1996] Ch 171. In my view whilst the standard of proof to establish rectification, both as to the existence of the error or failure and as to the true and alternative intention, is that of the ordinary civil burden of proof, and the burden of so proving lies on Ms. Hawken, it is no small thing to show that a will which appears to be coherent on its face is, in a particular part, in error. Had I concluded that the will on its true construction did not bequeath the turning and parking area by clause 3, I would not have been satisfied from the evidence that I have seen that a clerical error would have been made, on the balance of probabilities.

75. I turn next to Ms. Hawken's claim based on the doctrine of proprietary estoppel. In view of the conclusion I have reached on the issue of the construction of the bequest, I deal with this shortly. As stated by Lewison LJ in *Davies v Davies* [2016] EWCA Civ 463 at 38(ii):

> "ii) The ingredients necessary to raise an equity are (a) an assurance of sufficient clarity (b) reliance by the claimant on that assurance and (c) detriment to the claimant in consequence of his reasonable reliance: *Thorner v Major* at [29]."

76. I have found that the deceased assured Ms. Hawken that he would procure the transfer to her of Ponsandane Meadow on completion of the work. That assurance was given either before the work commenced or whilst it was on going. It was a serious assurance on which Ms. Hawking was entitled to rely. Ms. Hawken relied upon it in funding or continuing to fund the building works on the site. Ponsandane Meadow was completed or very substantially completed prior to the death of the deceased. It would be unconscionable for the deceased's estate to resile from that assurance. All of those findings demonstrate that an equity in the nature of a proprietary estoppel was created that bound the deceased and his estate. The issue in the case is what was meant by the assurance to transfer Ponsandane Meadow? In my opinion both the deceased and Ms Hawken considered that it extended to the land the subject of the building works necessary to create Ponsandane Meadow, and which would obviously be considered part of that residential unit. It therefore extended to the walled garden

and the parking and turning area, but not the drive. In the event, that was what the deceased intended to be bequeathed by clause 3. As the maximum relief that a court can grant under the doctrine is (in general) the entirety of the promise, it follows that Ms. Hawken is not entitled to any further relief.

77. Had I not found that clause 3 of the will conveyed the turning and parking area, then I would have concluded that this was the sort of transactional or quasi-contract case where the just and proportionate outcome, or the minimum equity to do justice, was the fulfilment of the parties' common understanding.

78. I therefore declare that the bequest under clause 3 of the November 2014 will extends to convey the land within the walled garden and the turning and parking area to Ms Hawken. It will also convey a vehicular and pedestrian right of way at all times and for all purposes along the driveway presently leading from the B3311 to Ponsandane Meadow.

79. I have been asked by Mr. Dickinson to make a declaration as to the existence of all other ancillary rights appurtenant to Ponsandane Meadow over the remainder of Ponsandane Gardens, being 'all further easements and rights for electricity gas water telephone and cable and other utilities and services as are reasonably required as set out in the Particulars of Claim', or an order that the transfer to Ms Hawken is to include such matters. Mr. Jelbert pleaded to the relevant paragraph in the Particulars of Claim asserting such rights in his defence as follows:

> "16. Paragraph 49 is not admitted to the extent that although it is admitted that the Claimant needs easement rights which the First Defendant is willing to grant on reasonable terms, the Claimant's entitlement to such rights as part of the express right of access is denied"

It appears on the one hand that Mr. Jelbert accepted that Ponsandane Meadow needed these ancillary rights, on the other he denied that any such rights existed save through the express terms of clause 3.

80. No reference was made in the hearing before me to these ancillary rights. I do not know what cables serve Ponsandane Meadow, when they were installed or planned. I have seen a planning document that concerns drainage. I do not consider that it is

appropriate for me to define the ancillary rights benefiting Ponsandane Meadow in my order. It is the case that Ponsandane Meadow will have the benefit of easements that are reasonably necessary to the enjoyment of Ponsandane Meadow, and the will contains an implied grant to this effect. The estate is now subject to the administration of Mr. Gaskins, and he will execute the transfer to give effect to the will. That transfer will contain such reference to ancillary rights granted over Ponsandane Gardens as he considers appropriate. In the event that there is dispute between himself, Ms. Hawken and/or Mr. Jelbert as to the extent of those rights, I shall give the parties liberty to restore the matter. I do hope that with the benefit of this judgment there will be no such disagreement.

81. I shall invite the parties to agree the form of the order and any consequential matters arising from this judgment. In the event that these matters have not been agreed within 14 days this matter will be listed for a 1 hour hearing for the first available date after 10 October 2022.