



Neutral Citation Number: [2023] EWHC 2054 (Ch)

Appeal No. CH-2022-000167

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**CHANCERY APPEALS (ChD)**

**On appeal from the order of Master Clark dated 26<sup>th</sup> July 2022 (Claim Number PT-2022-000029)**

Rolls Building  
7 Rolls Buildings  
Fetter Lane  
London, EC4A 1NL

7<sup>th</sup> August 2023

**Before :**

**MR JUSTICE EDWIN JOHNSON**

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**Between :**

**CLARE ALISON LAIRD  
(FORMER EXECUTOR AND TRUSTEE OF THE  
ESTATE OF ROBERT JOHN SIMCOCK  
DECEASED)**

**Claimant/  
Appellant**

**and**

**(1) CATHERINE ANNE LOWDER SIMCOCK  
(EXECUTOR, TRUSTEE AND  
BENEFICIARY OF THE ESTATE OF  
ROBERT JOHN SIMCOCK DECEASED)  
(2) CHARLOTTE REBECCA SIMCOCK  
(3) ELIZABETH JUNE SIMCOCK  
(4) GEMMA LOUISE SIMCOCK**

**Defendants/  
Respondents**

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**Paul Burton** (instructed by **Shakespeare Martineau LLP**) for the Claimant/Appellant  
The Defendants did not appear and were not represented at the hearing

Hearing date: 15<sup>th</sup> June 2023

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## JUDGMENT

**Remote hand-down: This judgment was handed down remotely at 10.30am on Monday 7<sup>th</sup> August 2023 by circulation to the parties and their representatives by email and by release to the National Archives.**

**Mr Justice Edwin Johnson:**

### Introduction

1. This is the hearing of an appeal against an order of Master Clark made on 26<sup>th</sup> July 2022. By that order (“**the Order**”) the Master dismissed the claim made by the Claimant for rectification of a deed of appointment dated 31<sup>st</sup> December 2019 (“**the Deed of Appointment**”). The Order was made pursuant to the judgment handed down by the Master on 26<sup>th</sup> July 2022 (“**the Judgment**”).
2. The Claimant/Appellant appeals against the Order with the permission of Adam Johnson J, granted by an order made on 14<sup>th</sup> November 2022.
3. On the hearing of this appeal (“**the Appeal**”) the Claimant/Appellant was represented by Paul Burton, counsel. The Appeal was unopposed. Accordingly, the Defendants/Respondents did not appear and were not represented on the hearing of the Appeal.
4. This is my judgment on the Appeal. I shall refer to the Claimant/Appellant as the Claimant, and to the Defendants/Respondents as the Defendants. References to Paragraphs are, unless otherwise indicated, references to the Paragraphs of the Judgment. Italics have been added to quotations.

### The parties

5. The Claimant and the First Defendant are the executors of the estate of Robert John Simcock who died on 26<sup>th</sup> December 2018. By his will, dated 6<sup>th</sup> May 2009, Robert Simcock created two will trusts of which the Claimant and the First Defendant (together “**the Trustees**”) are trustees. The Deed of Appointment, of which rectification is sought in this action, related to one of these will trusts.
6. The First Defendant, Catherine Simcock is the widow of Robert Simcock. The Second, Third and Fourth Defendants, Charlotte, Elizabeth and Gemma Simcock, are the adult children of Catherine and Robert Simcock. In common with the Master, I find it convenient to use first names in referring to members of the Simcock family. It will be understood that I intend no discourtesy by this form of reference. I will refer to Charlotte, Elizabeth and Gemma, collectively, as “**the Daughters**”.
7. The Claimant is a solicitor and was, at the relevant times, a partner in the firm of Shakespeare Martineau LLP (“**SM**”), the solicitors who act for the Trustees in relation to Robert’s estate (“**the Estate**”).

### The factual background to the claim for rectification

8. The factual background to the claim for rectification (“**the Claim**”) is set out, in admirable detail, in the Judgment (Paragraphs 7-37). As I am concerned with the

Appeal it is not necessary to set out the factual background with the same level of detail. The Appeal is however concerned with evidential issues. For this reason, and in order to set the scene for what I have to decide, it is necessary to set out a certain amount of the factual background. I am indebted to the Master for much of my account of this background.

9. Robert was a farmer who carried on a farming partnership (“**the Partnership**”) with his own parents (Joseph and Margaret Simcock) and his brothers, Charles, Jonathan and Martin Simcock. The Partnership owned farmland and associated residential and agricultural buildings. Robert owned a 16.6% share in the Partnership and had a 25% interest in its working capital.
10. As mentioned above, Robert established two trusts by his will (“**the Will**”). The first trust was established by clause 4 of the Will. Clause 4 provided as follows:
  - “4 **Gift for my Wife**
  - 4.1 *I give TWO HUNDRED THOUSAND POUNDS (£200,000), free of inheritance tax, to the Trustees to hold upon the following trusts.*
  - 4.2 *The income of the Fund shall be paid to my Wife during her lifetime.*
  - 4.3 *Subject as above, the Trustees shall hold the capital and income of the Fund upon the trusts contained in clauses 7 to 10 in relation to the Trust Fund, as if references to the “Trust Fund” were references to the Fund.”*
11. The Fund was defined in clause 18.7 of the Will in the following terms:
  - “18.7 **The 'Fund'** shall mean:
    - 18.7.1 *the legacy of £200,000 in clause 4;*
    - 18.7.2 *all accumulations (if any) of income added to the Fund; and*
    - 18.7.3 *the money, investments and property from time to time representing the above.”*
12. The second trust was established by clause 7 of the Will. Clause 7, in the part relevant for present purposes, provided as follows:
  - “7 **Residuary gift - discretionary trusts**
  - 7.1 *The Trustees shall hold the capital and income of the Trust Fund upon trust for or for the benefit of such of the Discretionary Beneficiaries, at such ages or times, in such shares, upon such trusts (which may include discretionary or protective powers or trusts) and in such manner generally as the Trustees shall in their discretion appoint....”*
13. The Trust Fund was defined in clause 18.4 of the Will in the following terms:
  - “18.4 **The 'Trust Fund'** shall mean:
    - 18.4.1 *my Estate, after the payment of my debts, funeral, testamentary and administration expenses and legacies;*
    - 18.4.2 *all money, investments or other property paid or transferred by any person to, or so as to be under the control of, and, in either case, accepted by the Trustees as additions;*
    - 18.4.3 *all accumulations (if any) of income added to the Trust Fund; and*
    - 18.4.4 *the money, investments and property from time to time representing the above.”*

14. The relevant point to note at this stage is that clause 7 of the Will gave the trustees a power of appointment in respect of the Trust Fund. It was pursuant to this power of appointment that the Deed of Appointment would subsequently be executed.
15. The Discretionary Beneficiaries, as defined in clause 18.8 of the Will, included Catherine, the Daughters and their remoter issue.
16. The Will was accompanied by a Memorandum of Wishes dated 5 May 2009 (“**the Memorandum**”) in respect of the Discretionary Trust. In the Memorandum Robert stated that he wished his residuary estate to be divided into three equal shares, one for each of his children. Paragraph 2.1 then stated as follows:

*“Priority amongst beneficiaries should be given to my children, as indicated above, my wife is included as a potential beneficiary only should it transpire that there is inheritance tax to pay on my death which could be mitigated by part of the estate being appointed on a life interest trust for her. In any event I wish all capital ultimately to pass to my three daughters in equal shares.”*
17. Following Robert’s death, on 26<sup>th</sup> December 2018, the family instructed Ben Sharp, an associate solicitor at SM. As I understand the position, this instruction came about because Robert had previously instructed SM, in February 2018, to review and advise upon the Will and the Memorandum.
18. Mr Sharp met Catherine, Charlotte and Elizabeth on 22<sup>nd</sup> January 2019. This meeting (“**the January Meeting**”) was also attended by a partner in SM, Peter Snodgrass. Mr Sharp has made three witness statements in this action. Mr Sharp’s evidence, in his first witness statement, was that the family sought advice on the distribution of the Estate and the deed of variation being prepared by Ladders, the solicitors acting in relation to the estate of Joseph Simcock, Robert’s father. There does not appear to have been any specific discussion, in this meeting, of an appointment out of the Discretionary Trust. Mr Sharp did however make a manuscript note of the meeting, which was exhibited to his first witness statement. The manuscript note includes the following:

*“\*Variation – Appt from Will Trust? Use Catherine as conduit”*
19. Beyond this, in his third witness statement, Mr Sharp gave the following further evidence in relation to the January Meeting:

*“10. The meeting on 22 January 2019 was the first meeting anyone from the firm had with the family. The First, Second and Third Defendants were in attendance with myself and Peter Snodgrass of this firm. It became quickly obvious to me that the nature of the deceased’s Will, with the entire estate falling on a discretionary trust, meant an immediate charge to Inheritance Tax would apply if the First Defendant’s spousal exemption was not used by way of an appointment of some sort out of the trust. This is mentioned in my attendance note of the meeting which is at pages A95-97. In addition, the unknown level of assets attracting APR or BPR (the position in respect of which was complicated as a result of an apparent ongoing dispute with the deceased’s siblings over the deceased’s late father’s estate) meant that it would be difficult to file an exact return with HMRC. I explained these issues to the attendees.*

11. *I did not suggest that the whole estate should simply be appointed to the First Defendant, either absolutely or on a life interest trust. Since this was an initial appointment and we were in the process of gathering asset and liability information, the discussion on this topic did not proceed further than these initial comments.”*
20. There was further correspondence with SM in relation to the Estate in the course of 2019. It is not necessary to go through this correspondence individually. On 28<sup>th</sup> November 2019 Elizabeth and Charlotte sent a lengthy email to Peter Snodgrass in which, amongst other matters, they expressed their concern with the lack of progress in relation to the application for probate in relation to the Estate, combined with an approaching Inheritance Tax (“**IHT**”) deadline on 31<sup>st</sup> December 2019.
21. On 20<sup>th</sup> December 2019 Mr Sharp sent by email a letter addressed to Catherine which enclosed “*the Inheritance Tax paperwork and Deed of Appointment in Robert’s estate for your kind attention.*”. The Master commented that this was the first occasion, either in the correspondence or in any document in evidence, on which the Deed of Appointment was mentioned; see Paragraph 21. So far as I can see, the Master was correct in this comment.
22. In relation to what was then the draft Deed of Appointment, the letter of 20<sup>th</sup> December 2019 (“**the December Letter**”) stated as follows (the underlining is also added):  
*“I should advise from the outset that these forms are not straight-forward, but I do think it is important that you understand the principles of what we are setting out to achieve, which I shall endeavour to do as simply as possible below.  
Firstly, there will be no Inheritance Tax due on Robert’s estate. As I worked through the figures which Alistair and Peter provided me with based on Brown & Co’s valuation, and in particular taking note that only a certain proportion of the farm assets would attract agricultural property relief (APR) from Inheritance Tax, I have drafted a Deed of Appointment on life interest terms in your favour, as I suggested at our initial meeting this year. In essence, what this does is to pay whatever assets not attracting Inheritance Tax from the discretionary trust onto a different kind of trust in your favour, which attracts spousal exemption from the tax. As such, I am not too concerned with any enquiries which the Revenue may raise in respect of value of the farm assets or their APR value, because anything which does not attract the relief will, by default, attract spousal exemption instead. The other point is of course that the farm figures are not fixed; it appears quite possible that they will be subject to assessment and possible litigation between the Trustees and Robert’s brothers, and this is something that I will make clear to the Revenue when I correspond with them, to notify them that the figures are provisional.  
Therefore I should be grateful if you could please read through the Deed and then sign it where indicated with an independent witness, who must add his or her details accordingly. My Partner in my team, Clare Laird, is the other Executor and Trustee.”*
23. The underlined sentence does not make sense when read with the underlined section of the following sentence, which proceeds on the basis that the Deed of Appointment would appoint to Catherine a life interest in those assets in the Trust Fund which did not qualify for IHT relief (“**the IHT Liable Assets**”). The Master proceeded on the

basis that the words “*not attracting Inheritance Tax*”, in the first underlined sentence, should have read “*not attracting Inheritance Tax relief*”. It seems to me right, particularly given the terms of the following sentence, to accept that this is what Mr Sharp meant to say in the underlined sentence of the letter.

24. The Deed of Appointment was executed on 31<sup>st</sup> December 2019. On the same date the IHT400 Form in respect of the Estate was submitted to HM Revenue & Customs. At box 93 of this form (“**the IHT400 Form**”), which dealt with exemptions and reliefs, a claim for agricultural/business property relief was made in respect of the sum of £929,984, and a spouse exemption was claimed in respect of the sum of £483,685. The spouse exemption claim was in the following terms:

*“Spousal exemption on life interest of residuary estate, appointed from residuary discretionary will trust”*

25. Probate was granted to the Trustees in respect of the Estate on 26<sup>th</sup> February 2020. The net value of the Estate was shown as £1,591,167. The interest of the Estate in the Partnership was valued for probate purposes at £1,048,668.

#### The problem

26. As executed, clause 2 of the Deed of Appointment provided as follows:

“2 **Appointment**

*The Appointors, in exercise of the power of appointment conferred by clauses 8 and 9 of the Will and of all other relevant powers, hereby irrevocably appoint and declare that*

- 2.1 *The income of the Trust Fund shall be paid to Catherine during her lifetime.*
- 2.2 *The Trustees may, at any time during the Trust Period, pay or apply the whole or any part of the Trust Fund in which Catherine is then entitled to an interest in possession to her or for her advancement or otherwise for her benefit in such manner as the Trustees shall in their discretion think fit or to any of the Discretionary Beneficiaries set out in 18.8 of the Will. In exercising the powers conferred by this sub-clause, the Trustees shall be entitled to have regard solely to the interests of Catherine and to disregard all other interests or potential interests in the Trust Fund.*
- 2.3 *Subject as above, the capital and income of the Trust Fund shall be held upon trust for Catherine's children as survive her and if more than one in equal shares **PROVIDED** that if any such child dies in Catherine's lifetime leaving a child or children such child or children shall take the deceased child's share of the Trust Fund”*

27. As can be seen, the effect of clause 2 of the Deed of Appointment was to appoint a life interest in the Trust Fund to Catherine. The Trust Fund was not separately defined in the Deed of Appointment. Clause 1 of the Deed of Appointment did however provide that the definitions in the Will should apply, where the context admitted. The Trust Fund had therefore the same meaning as in the Will. I repeat the definition in the Will, for ease of reference:

“18.4 *The 'Trust Fund' shall mean:*

18.4.1 *my Estate, after the payment of my debts, funeral, testamentary and administration expenses and legacies;*

- 18.4.2 *all money, investments or other property paid or transferred by any person to, or so as to be under the control of, and, in either case, accepted by the Trustees as additions;*
- 18.4.3 *all accumulations (if any) of income added to the Trust Fund; and 18.4.4 the money, investments and property from time to time representing the above.”*
28. The Trust Fund, which was the subject of the appointment in clause 2 of the Deed of Appointment, was therefore the entirety of the assets subject to the Discretionary Trust, whether eligible for IHT relief or not. The assets which were the subject of the appointment were not expressed to be confined to the IHT Liab Assets.
29. Accordingly, clause 2 of the Deed of Appointment did not achieve the objective outlined by Mr Sharp in the December Letter.
30. This problem took some time to come to light. As the Master recorded in the Judgment, in 2020 both Mr Sharp and Andrew Wilkinson, a partner in SM, engaged in correspondence with Dr Jennifer Stutley, Catherine’s sister, and with solicitors acting for Elizabeth and Charlotte on the basis that the Deed of Appointment had converted the Discretionary Trust into a life interest trust in favour of Catherine. It was not until 24<sup>th</sup> May 2021 that Mr Wilkinson wrote to the solicitors acting for Elizabeth and Charlotte making the following assertion:
- “We have reviewed the correspondence that led up to the Deed of Appointment being executed and our conclusion is that an error was made in the drafting of the deed, such that it appointed the entire estate on life interest trust when, in fact, it should only have appointed the tax-bearing assets onto the trust.”*

### The Claim

31. This action was commenced by claim form issued on 13<sup>th</sup> January 2022. The primary relief sought by the Claimant, that is to say the subject matter of the Claim, was an order for rectification in the following terms:
- “an order for rectification of the Deed so that clause 2.1 of the Deed is rectified to read “the income of all that part of the Trust Fund which does not attract any relief from Inheritance Tax given by the provisions of Chapter I or Chapter II of Part V of the Inheritance Tax Act 1984, or any modification or re-enactment of them, shall be paid to Catherine during her lifetime”*
32. The evidence in support of the Claim originally comprised a first witness statement of Mr Sharp and a witness statement of Mr Wilkinson. Each was dated 12<sup>th</sup> January 2022. A witness statement in response was filed by Elizabeth, dated 10<sup>th</sup> February 2022. Elizabeth’s witness statement is lengthy, and goes in some detail into the falling out which had by then occurred between the Daughters and Catherine. Elizabeth also pointed out, in that witness statement, that no evidence had been adduced from either of the Trustees in support of the Claim. In response the Claimant filed a witness statement of her own, dated 22<sup>nd</sup> February 2022, and a witness statement of Catherine, dated 23<sup>rd</sup> February 2022. It seems reasonable to assume that this further evidence from the Trustees was served as a result of Elizabeth pointing out the absence of evidence from the Trustees in her own witness statement. This further evidence was followed by a

second witness statement of Mr Sharp, dated 11<sup>th</sup> April 2022, and a second witness statement of Elizabeth dated 12<sup>th</sup> April 2022.

33. The Claim came on for hearing before the Master on 29<sup>th</sup> April 2022. The hearing was attended by counsel for, respectively, the Claimant, Catherine, and the Daughters. As I understand the position, the Defendants did not oppose the Claim, although I understand that there was an issue as to how the costs of the Claim were to be dealt with. Also before the Master at this hearing were certain applications made, respectively, by Catherine and the Daughters.
34. By an order made on 29<sup>th</sup> April 2022 the Master gave directions for a further hearing, the purpose of which, as I understand the position, was to deal with the Defendants' applications and all costs issues. This order did not however dispose of the Claim, on which I assume that the Master reserved her judgment.
35. On 10<sup>th</sup> May 2022 the Master issued further directions, in relation to the Claim, which were in the following terms:

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  1. *My preliminary view is that the evidence is insufficient to show the “clerical error” set out at para 9 of the details of claim, and the claim does not therefore succeed.*
  2. *Since the claim is unopposed, I am willing to give the claimants an opportunity to file further evidence, including:*
    - (1) *documents evidencing the information and advice (both oral and written) provided by Mr Sharpe to Mrs Simcock in relation to the proposed deed of appointment (“the Deed”) (in addition to his letter dated 20 December 2019), including the information and advice given*
      - (i) *at the meeting on 22 January 2019 (Mr Sharpe's letter of 20 December 2019, and para 27 of his statement refers – but does give any account of what happened); and*
      - (ii) *in the phone call on 31 December 2019 (referred to in Mr Sharpe's email of that date);*
    - (2) *documents evidencing Mrs Simcock's instructions to Mr Sharpe in respect of the Deed;*
    - (3) *documents evidencing*
      - (i) *the information and advice (both oral and written) provided by Mr Sharpe to Ms Laird in relation to the Deed;*
      - (ii) *Ms Laird's instructions to Mr Sharpe in respect of the Deed;*
    - (4) *an explanation by Mr Sharpe as to his thought processes when drafting the Deed, in particular how and why he chose to use the expression “the Trust Fund”; and any documents evidencing those thought processes;*
    - (5) *documents evidencing the understanding of each of Mrs Simcock and Ms Laird as to the meaning of "tax bearing assets" at the date of executing the Deed, and how they reached that understanding;*
    - (6) *an explanation by each of Mrs Simcock and Ms Laird as to:*
      - (i) *whether they read the Deed before signing it;*
      - (ii) *if so, what they understood its effect to be by reference to its wording, including the use of the term “Trust Fund”;*



- (iii) if and to the extent they did not read it, the basis of their understanding as to its effect (including the documents read by them in reaching that understanding).*
3. *For the avoidance of doubt, the above does not limit or constrain the claimants in the additional evidence they may wish to file.”*
36. The Master explained her reasons for issuing these further directions (“**the May Directions**”) at Paragraph 40:  
*“40. Following the hearing on 29 April 2022, I formed the preliminary view that the claim would fail on the evidence before the court. However, since the claim was unopposed, I offered the parties an opportunity to file further evidence as to the state of knowledge and the intention of each of the trustees when executing the Deed.”*
37. Following the May Directions the Claimant filed a second witness statement of her own, dated 17<sup>th</sup> June 2022, and a third witness statement of Mr Sharp, dated 16<sup>th</sup> June 2022 (the date under the signature is 17<sup>th</sup> June 2022).
38. The Master then proceeded to hand down the Judgment on 26<sup>th</sup> July 2022. Consequential upon the Judgment, and by the Order, the Master dismissed the Claim.

#### The Judgment

39. After setting out the background to the Claim, and a summary of the evidence filed in the action (Paragraphs 7-41), the Master summarised the relevant legal principles, at Paragraphs 42-44. The Master then turned to her analysis and conclusions.
40. The Master considered first the question of whether the Claimant, when she signed the Deed of Appointment, had intended to sign the Deed of Appointment on the basis that it appointed to Catherine a life interest in the IHT Liable Assets alone. After reviewing the evidence of the Claimant, in her two witness statements, the Master reached the following conclusions, at Paragraphs 49-52:  
*“49. The effect of Ms Laird’s evidence is that, when executing the Deed, she had no knowledge of what was intended to be achieved by it. Although she says that she relied on Mr Sharp to advise her, she does not state that he did. I am not therefore satisfied that she had any intention as to what she was achieving by executing the Deed. Her only intention was to sign the document which Mr Sharp put before her to sign.*
50. *Her evidence in her second statement is also, in my judgment, inconsistent with that in her first witness statement, such that it is difficult to understand how she could have signed the statement of truth in the first witness statement.*
51. *Ms Laird’s second witness statement also sets out her understanding of the expression “tax bearing assets” as being, unsurprisingly, assets in respect of which inheritance tax would be paid. There is no reference by her to its meaning in the context of the deceased’s estate i.e. assets in respect of which APR or BPR was not available, or indeed any indication that she knew that the estate included assets in respect of which these reliefs could be claimed. Indeed, if she had understood what Mr Sharp says he was intending to achieve by the Deed, it is difficult to see how having read the Deed, she could have signed it.*

52. *I have taken into account that Mr Sharp in his third witness statement (at para 14) says that he recalls telling Ms Laird that the intention of the Deed was to appoint the taxbearing assets only to Catherine on a life interest trust, and that this did not constitute an appointment of the whole estate to her. No details are given, and there are, as noted, no file notes or any other records of any conversations between Ms Laird and Mr Sharp. In my judgment, the inference to be drawn from the evidence as a whole is that Ms Laird delegated matters in their entirety to Mr Sharp, and lacked any relevant intention when executing the Deed.”*
41. The Master then considered the question of whether Catherine, when she signed the Deed of Appointment, had intended to sign the Deed of Appointment on the basis that it appointed to Catherine a life interest in the IHT Liable Assets. After quoting from Catherine’s first witness statement, the Master reached the following conclusions, at Paragraphs 54-55:
- “54. *This in my judgment falls short of showing the specific intention that the trustees are said to have had, namely that only the tax-bearing assets would be appointed to Catherine. The general intention referred to by her was of course achieved by the Deed as executed, because the entirety of the residuary estate thereby became subject to spousal relief.*
55. *Catherine’s second witness statement confirms that she did not give any instructions to Mr Sharp as to the contents of the Deed. The only written information she received from him was his letter dated 20 December 2019, enclosing the draft Deed. The letter itself contains a confusing error (the omission of the word “relief”) and it is clear from Catherine’s evidence that she did not understand it. In my judgment it is not possible on this evidence to attribute to Catherine an intention, when she executed the Deed, that only assets which did not attract APR or BPR would be appointed from the discretionary trust to a life interest trust in her favour.”*
42. The Master expressed her overriding conclusion in the following terms, at Paragraph 56:
- “56. *For these reasons, I am not therefore satisfied that the claimant, Ms Laird, has shown to the level required of “convincing proof” that the trustees had the true intention alleged as being that to which effect was not given in the Deed. The claim therefore fails.”*

#### The grounds of appeal

43. The Appellant contends that the Claim was an unopposed claim for rectification of a deed of appointment. The Appellant says that the Master’s decision to dismiss the Claim was wrong and was based on a serious procedural irregularity. This general contention is divided into the following grounds of appeal.
- (1) The Master misdirected herself on the applicable law by:
- (i) failing to apply the correct test when determining whether grounds for rectification had been established; and/or
  - (ii) failing to apply the correct standard of proof to the Claim.
- (2) The Master misdirected herself on the evidence by:
- (i) failing to properly evaluate the evidence and have any, or any sufficient, regard to the unopposed nature of the evidence; and/or

- (ii) making findings of fact that were not open to her on the evidence before the court and/or that could not be fairly or properly made at the disposal hearing of a Part 8 claim on written evidence; and/or
- (iii) failing to make necessary findings of fact; and/or
- (iv) failing to have any, or any sufficient, regard to the nature of the final hearing and/or failing to direct a further hearing, or trial of the claim, in circumstances where unopposed evidence was not accepted by the court.

The law – rectification and evidence

44. The Claim is a claim for rectification of a unilateral (or voluntary) document, in the sense that, by the Deed of Appointment, the Trustees were making an appointment out of the Discretionary Trust, in favour of Catherine.

45. In *Giles v RNIB* [2014] EWHC 1373 (Ch) Barling J, at [24], identified the decision of the Court of Appeal in *Racal Group Services Ltd v Ashmore* [1995] STC 1151 as a leading authority and source of guidance on claims for rectification of unilateral (or voluntary) documents. Barling J then summarised the criteria for the grant of the discretionary remedy of rectification, as derived from an analysis of the judgment of Peter Gibson LJ in *Racal*, in the following terms, at [25] (I have omitted the final part of this summary, which deals with a criterion not material in the present case):

- “(1) *While equity has power to rectify a written instrument so that it accords with the true intention of its maker, as a discretionary remedy rectification is to be treated with caution. One aspect of that caution is that the claimant’s case should be established by clear evidence of the true intention to which effect has not been given in the instrument. Such proof is on the civil standard of balance of probability. But as the alleged true intention of necessity contradicts the written instrument, there must be convincing proof to counteract the evidence of a different intention represented by the document itself (1154h-1155b);*
- (2) *There must be a flaw in the written document such that it does not give effect to the parties’/donor’s agreement/intention, as opposed to the parties/donor merely being mistaken as to the consequences of what they have agreed/intended; for example it is not sufficient merely that the document fails to achieve the desired fiscal objective (1158f-g);*
- (3) *The specific intention of the parties/donor must be shown; it is not sufficient to show that the parties did not intend what was recorded; they also have to show what they did intend, with some degree of precision (1158g-j);”*

46. The nature of the exercise being carried out by the court, where it grants rectification of a voluntary settlement, was summarised in the following terms by Mummery LJ in *Allnutt v Wilding* [2007] EWCA Civ 412, at [11]:

- “11. *In other words, rectification is about putting the record straight. In the case of a voluntary settlement, rectification involves bringing the trust document into line with the true intentions of the settlor as held by him at the date when he executed the document. This can be done by the court when, owing to a mistake in the drafting of the document, it fails to record the settlor’s true intentions. The mistake may, for example, consist of leaving out words that were intended to be put into the document; or putting in words that were not intended to be in the document; or through a misunderstanding by*

*those involved about the meanings of the words or expressions that were used in the document. Mistakes of this kind have the effect that the document, as executed, is not a true record of the settlor's intentions."*

47. The emphasis upon the subjective intention of the settlor/donor is illustrated by *Day v Day* [2013] EWCA Civ 280 [2014] Ch 114. At [22] Sir Terence Etherton C (as he then was) explained that an outward expression of intention or objective communication of such intention did not have to be demonstrated, where rectification is sought of a voluntary settlement:

*"What is relevant in such a case is the subjective intention of the settlor. It is not a legal requirement for rectification of a voluntary settlement that there is any outward expression or objective communication of the settlor's intention equivalent to the need to show an outward expression of accord for rectification of a contract for mutual mistake: see, for example, the line of pensions cases AMP (UK) plc v Barker [2001] Pen LR 77, paras 67—68, Gallaher Ltd v Gallaher Pensions Ltd [2005] Pen LR 103, paras 116—117 and Drake Insurance v McDonald [2005] Pen LR 401, paras 34—35. In Chartbrook Ltd v Persimmon Homes Ltd [2009] AC 1101 the House of Lords agreed with Lord Hoffmann's (obiter) explanation of an objective test for rectification for mutual mistake in the case of a contract so as to bring the final document into line with the parties' prior consensus objectively ascertained. Nothing he said there touched upon the requirements for rectification for unilateral mistake in a non-contract case."*
48. The Chancellor did however add the following, at the end of [22], in relation to discharging the evidential burden involved in establishing a right to rectification:

*"Although, as I have said, there is no legal requirement of an outward expression or objective communication of the settlor's intention in such a case, it will plainly be difficult as a matter of evidence to discharge the burden of proving that there was a mistake in the absence of an outward expression of intention."*
49. Finally, in relation to rectification, Mr Burton accepted that the required subjective intention had to be demonstrated in relation to both of the appointors under the Deed of Appointment; that is to say both the Claimant and Catherine.
50. Turning to the evidential position in the present case, the hearing of the Claim before the Master was unopposed, and the evidence of the Claimant's witnesses as set out in their witness statements, was not subject to any cross examination or challenge by any of the Defendants. In terms of the approach of the court to dealing with unchallenged evidence Mr Burton drew my attention to two authorities in particular.
51. The first of these cases was *Long v Farrer* [2004] EWHC 1774 (Ch). The case was concerned with an appeal against an order made by Mr Registrar Jaques in bankruptcy proceedings. The trustee in bankruptcy sought, pursuant to Section 366(1) of the Insolvency Act 1986, an order for the production of any documents held by Farrers, solicitors, relating to the dealings, affairs and property of the bankrupt (a Mr Belcher), including his dealings with the trustees of a settlement. The Registrar made the order sought, in a modified form. One of the two main issues in the appeal was whether the Registrar had been entitled to hold, as he did, that Mr Belcher, and thus his trustee in bankruptcy was jointly entitled with others to the legal professional privilege which attached to the documents the production of which was disputed. This in turn depended

upon whether Mr Belcher had been a client of Farrers in relation to the relevant transactions, or whether the only clients had been the trustees of the settlement. At the hearing of the application, the Registrar had before him witness statements from the parties which were in conflict. There was no cross examination of the witnesses at the hearing but the Registrar, for the reasons which he set out in a short judgment, preferred the evidence of Mr Belcher. Mr Belcher was one of the witnesses whose evidence, as set out in his witness statement, was relied upon by the applicant trustee in bankruptcy.

52. On appeal it was contended that the Registrar had not been entitled to prefer the evidence of the applicant's two witnesses, as set out in their witness statements, over the conflicting evidence of the respondents' witness, as set out in his witness statement. In his judgment on the appeal Rimer J (as he then was) rejected the bulk of the arguments in support of this contention. The judge did however, at [57], accept this point:

*“57. There remains, however, Mr Collings's more general point that the Registrar was faced with the task of deciding a factual issue on which he had directly conflicting witness statements. They were those of Mr Satow and Mr Belcher asserting that Mr Belcher was a Farrers' client in December 1990; and that of Mr Gordon which, with masterly economy, was to the opposite effect. In my view that does raise a difficulty with the Registrar's decision. The reason for that is that the Registrar was dealing with an application which (subject only to any appeal) finally decided the rights of the parties with regard to the section 366(1) application. It was, therefore, akin to a trial, albeit one of modest dimensions. It is, I believe, by now familiar law that, subject to limited exceptions, the court cannot and should not disbelieve the evidence of a witness given on paper in the absence of the cross-examination of that witness. The principle has traditionally been stated in relation to statements made under oath or affirmation, but it was not suggested to me that it does not apply equally to a witness statement. I will refer to three authorities.”*

53. At [58]-[60] Rimer J went through the three authorities to which he had made reference at the end of [57]. It is not necessary to make individual reference to these authorities, but Rimer J's conclusion, at [61], was that these authorities established only a limited exception to the principle that the court cannot and should not disbelieve the evidence of a witness given on paper, in the absence of cross examination of that witness:

*“61. The basic principle is, therefore, not an unqualified one. In particular, paper evidence which is manifestly incredible can be disregarded or disbelieved. But it will require a fairly extreme case for untested paper evidence to be rejected on that basis.”*

54. Rimer J then considered the way in which the Registrar had resolved the evidential conflict before him. While sympathetic to the exercise which the Registrar had carried out. Rimer J did not consider the case to be one where the evidence of the respondents' witness could be rejected for the reasons given by the Registrar, which did not include a finding that the evidence was incredible. The judge concluded that the Registrar's approach was flawed in law. The judge concluded this part of his judgment in the following terms, at [65]:

*“65. Subject to one point, I have therefore come to the view that the general principle about conflicting paper evidence precluded the Registrar from*

*weighing up the opposing accounts in the way he did and making the finding of fact that he did. In my judgment he should have concluded that, without cross-examination of the witnesses, he could not decide where the truth lay.”*

55. The second of the two cases drawn to my attention by Mr Burton was *Coyne v DRC Distribution* [2008] EWC Civ 488. I do not need to go through the detail of this case. For present purposes it is only necessary to note that Rimer LJ confirmed his previous statement of the law in *Long v Farrer*, in the following terms, at [58]:

“58. *As regards the need for oral evidence, Mr Ashworth reminded us that it is well-settled practice that if a court finds itself faced with conflicting statements on affidavit evidence, it is usually in no position to resolve them, and to make findings as to the disputed facts, without first having the benefit of the cross-examination of the witnesses. Nor will it ordinarily attempt to do so. The basic principle is that, until there has been such cross-examination, it is ordinarily not possible for the court to disbelieve the word of the witness in his affidavit and it will not do so. This is not an inflexible principle: it may in certain circumstances be open to the court to reject an untested piece of such evidence on the basis that it is manifestly incredible, either because it is inherently so or because it is shown to be so by other facts that are admitted or by reliable documents. Mr Ashworth referred us in support to Re Hopes (Heathrow) Ltd, Secretary of State for Trade and Industry v. Dyer and others [2001] 1 BCLC 575, at 581 to 582 (Neuberger J). He also referred us to paragraphs 17 and 18 of the judgment of Mummery LJ in Doncaster Pharmaceuticals Group Ltd and Others v. The Bolton Pharmaceutical Company 100 Ltd [2006] EWCA Civ 661, which provides a reminder of the caution the court should exercise in granting summary judgment in cases in which there are conflicts of fact which have to be resolved before judgment can be given. Mr Ashworth said that these principles apply equally to the case in which the evidence is given by witness statement rather than by affidavit, and I agree. I said as much in my summary of the principles in Long v. Farrer & Co and Farrer [2004] EWHC 1774 (Ch); [2004] BPIR 1218, at paragraphs 57 to 61.”*

56. In the present case, and although there was evidence in the form of a witness statement from Elizabeth, my understanding is that the evidence from the Claimant’s witnesses was unchallenged, at least so far as that evidence was concerned with the circumstances in which the Deed of Appointment came to be executed by the Trustees, and the intention of the Trustees when executing the Deed of Appointment (such as that evidence was). The case was not one, in contrast to *Long* and *Coyne*, where there was a conflict in the relevant evidence. That said, it seems to me that the principle identified in *Long*, namely that, subject to limited exceptions, the court cannot and should not disbelieve the evidence of a witness given on paper in the absence of the cross-examination of that witness. applied equally to the Master’s consideration of the evidence before her at the hearing of the Claim.
57. Neither *Long* nor *Coyne* were cited to the Master at the hearing of the Claim. This is a point which I will come back to at the end of this judgment.
58. There are, in my view, two other evidential points which are worth stressing in the context of the present case, although both are more a statement of the obvious than a statement of law.

59. First, in a case where the court is confined to considering paper evidence, whether in the form of witness statements or affidavits, the court is equally confined to what the relevant witness actually says in the relevant witness statement or the relevant affidavit. The court has to construe what is in the witness statement or affidavit, without the benefit of the witness being able to elaborate. If the evidence is ambiguous or opaque, the court may not be satisfied, on the balance of probabilities, that a particular fact has been established. If the evidence to establish a particular fact is simply missing from the witness statement or affidavit, that is it, so far as the evidence of the relevant witness is concerned. Again, the witness cannot fill in the gap, assuming that the witness would, if asked, have been able to fill in the gap. In each of the situations which I have just postulated it may be possible for sufficient proof of the relevant fact to be found elsewhere, in the evidence of another witness and/or in the documents. Further or alternatively, the party which finds itself with an ambiguity or a gap in its evidence may, if the circumstances allow, have the opportunity to ask the relevant witness to clarify or supplement their evidence in a further witness statement or affidavit. What the court cannot do is to read evidence into a witness statement or affidavit which is simply not there.
60. Second, the fact that evidence is unchallenged does not mean that it cannot be subject to careful scrutiny by the court. The court is quite entitled to look carefully at the relevant evidence, in order to see whether it actually establishes what is required to be established. Indeed, in a case where the evidence is unchallenged, and is not therefore subject to the scrutiny which it would receive in an opposed hearing, it is all the more important that the court is careful in its consideration of what the evidence actually establishes. While there is of course no sliding scale, in terms of the care which the court should bring to the scrutiny of unchallenged evidence, a claim for rectification is an obvious example of a case where the unchallenged evidence needs to be looked at carefully, in order to see whether the elements required to prove an entitlement to the remedy of rectification are actually established by the evidence.

#### The first ground of appeal - analysis

61. The first limb of the first ground of appeal is that the Master misdirected herself by failing to apply the correct test when determining whether grounds for rectification had been established. I can take the first limb shortly.
62. The Master set out the test for rectification of a unilateral document in Paragraphs 42-44. The Master first cited *Allnutt* and quoted Mummery LJ at [11]. The Master then cited *Racal, Giles v RNIB*, and *RBC Trustees (CI) Ltd v Stubbs* [2017] EWHC 180 (Ch), from which she quoted the judgment of Rose J (as she then was), at [38]-[42]. Finally, the Master cited *Day v Day* as authority for the following proposition, at Paragraph 44:
- “44. *As to intention, the relevant intention is the subjective intention of the maker of the deed: Day v Day [2014] Ch 114 at [22]. It is not, in my judgment, the intention of the person drafting the deed, or even (as in Day v Day) the intention of a person executing the deed on behalf of the maker. It follows that Mr Sharp’s intentions in drafting the Deed are relevant only insofar as they reflected his instructions from the trustees as to their intentions.*”

63. I cannot see any misdirection or error of law in the Master's summary of the test for rectification of a unilateral document such as the Deed of Appointment. In particular, the Master was plainly right to emphasize the point that the relevant intention is the intention of the maker of the relevant deed. In terms of the evidence in the present case, this was an important point. On the evidence, it is clear that the solicitor within SM who was the principal person acting for the Trustees in relation to the Estate was Mr Sharp. In particular, it was Mr Sharp who advised in relation to the Deed of Appointment, drafted the Deed of Appointment and arranged for the execution of the Deed of Appointment. Mr Sharp was not however one of the Trustees. This was an important distinction to keep in mind in relation to the question of whether the required subjective intention had been demonstrated. The subjective intention which had to be proved was that of the Claimant and Catherine, respectively, not Mr Sharp.
64. Turning to the application of that test to the evidence, I cannot see that the Master, in the Judgment, lost sight of the test she was applying. The question the Master asked herself, in relation to each of the Claimant and Catherine, was whether the required intention had been demonstrated. The required intention was an intention that clause 2.1 of the Deed of Appointment should appoint to Catherine a life interest in the income from the IHT Liable Assets, as opposed to a life interest in the income from the entirety of the Trust Fund. This required intention had to be demonstrated as having been the intention of each and both of the Claimant and Catherine when they signed the Deed of Appointment. For ease of reference I will refer to this required intention as **"the Required Intention"**.
65. In the case of the Claimant the Master came to the conclusion, at Paragraph 52, that the Claimant had delegated matters in their entirety to Mr Sharp, and had lacked any relevant intention when executing the Deed of Appointment. In the case of Catherine the Master concluded, at Paragraph 55, that it was not possible, on the evidence, to attribute to Catherine the required intention.
66. In the relevant part of his written and oral submissions, Mr Burton made various criticisms of the Master's dealing with the evidence. Those criticisms seem to me however to be relevant to the second ground of appeal, and I will return to them when dealing with the second ground of appeal. I do not think that any of those criticisms, if valid, demonstrate that the Master applied the wrong test for rectification of a unilateral document. To the contrary, it seems to me quite clear from the terms of the Judgment that the Master applied the correct test.
67. I therefore conclude that there was no failure by the Master to apply the correct test when determining whether grounds for rectification had been established. Accordingly, the first limb of the first ground of appeal fails.
68. I therefore turn to the second limb of the first ground of appeal, which is that the Master failed to apply the correct standard of proof to the Claim.
69. The essential argument here is that the Master, while initially identifying that the standard of proof was the ordinary civil standard of balance of probabilities, thereafter became distracted by the expression "*convincing proof*", which appears in the judgment of Barling J in *Giles v RNIB*, at [25], and thereby failed to apply the correct



standard of proof. What the Master did, so it was submitted, was to apply a higher, and incorrect standard of proof.

70. In support of this part of his argument Mr Burton cited two authorities, in particular.
71. The first was the decision of the House of Lords in *Re B (Children) (Care Proceedings: Standard of Proof)* [2008] UKHL 35. Mr Burton's purpose in referring me to this decision was to make good the point, which I of course accept, that there is no sliding scale in relation to the standard of proof. There is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not; see Lord Hoffmann's speech in *Re B*, at [13].
72. The second authority was the decision of His Honour Judge Hodge KC in *Ashcroft v Barnsdale* [2010] EWHC 1948 (Ch). Mr Burton referred specifically to what Judge Hodge had to say, at [16], in relation to the evidential burden in a rectification case where the mistake resulted from the inadvertent omission of a word or phrase from a document, as opposed to a case where it is sought to introduce additional words into a document, in order to cure the mistake:

*"It is now firmly established that the fact that the parties intended to use a particular form of words in the mistaken belief that it was achieving their common intention does not prevent the court from giving effect to their true intention. Further, it seems to me that where (as here) the mistake results from the inadvertent omission of a word or phrase from a document, and it is sought to introduce additional words into the document to cure that mistake, it may, in practice, prove easier to discharge the evidential burden of establishing the existence of a mistake than in the case where words have been inadvertently included in the document which it is sought to rectify. This is because parties may not always appreciate the legal effect of the omission of particular words."*
73. I understood Mr Burton's point to be that Judge Hodge's approach to cases of inadvertent omission falls to be contrasted with the approach of the Master to the standard of proof in the present case.
74. In this context I was pressed with the argument by Mr Burton, in his written and oral submissions, that the present case was one where it was not disputed that a clerical error had occurred in the drafting of the Deed of Appointment, which resulted in the erroneous reference to the Trust Fund, rather than the IHT Liable Assets within the Trust Fund. Mr Burton's point was that in a case, such as the present case, where it was not in dispute that the relevant mistake was the result of a clerical error, there was no case for a requirement of convincing proof or anything similar. The mistake was established. There was no need or justification for any "*convincing proof*" that the mistake had occurred.
75. As Lord Hoffmann has reminded us, in *Re B*, there is only one civil standard of proof; namely proof that the fact in issue more probably occurred than not. It is however also important to state that there is nothing in what was said by Barling J in *Giles v RNIB* to subvert that rule. Barling J's reference to convincing proof, at [25(1)], was but one of a number of such statements which can be found in cases on rectification. As Barling J pointed out, the civil standard of probability applies but, "*as the alleged true intention of necessity contradicts the written instrument, there must be convincing proof to*

*counteract the evidence of a different intention represented by the document itself*". As Barling J also pointed out, on the basis of his analysis of what Peter Gibson LJ had said in *Racal*, while equity has the power to rectify a written instrument so that it accords with the true intention of its maker, "*as a discretionary remedy rectification is to be treated with caution*". One aspect of that caution is that "*the claimant's case should be established by clear evidence of the true intention to which effect has not been given in the instrument*". None of these statements, or others to the same effect are in conflict with the standard of proof in civil cases. They simply reflect the particular nature of rectification claims. Equally, none of these statements are in conflict with what Judge Hodge said in *Ashcroft*. Judge Hodge was simply reflecting on the difference which he perceived, in terms of satisfying the burden of proof, as between cases involving the omission of words, and cases involving the need to add words.

76. Given this position, I cannot accept that the Master failed to apply the correct standard of proof. The Master directed herself by reference to what Barling J had said in *Giles v RNIB*, as restated in *RBC Trustees (CI) Ltd v Stubbs*. In those circumstances I cannot see that the Master went wrong in her reference to the requirement for convincing proof, at [56], any more than Barling J or Rose J went wrong in their respective references to convincing proof in *Giles v RNIB* and *RBC Trustees*.
77. Mr Burton's answer to this was that on the facts of the present case, where it was not in dispute that the relevant mistake was the result of a clerical error, the requirement for convincing proof should not have applied. The question of whether a mistake had been made in the relevant document, namely the Deed of Appointment, was not in issue.
78. I accept that the evidence did establish that an error had been made in the drafting of the Deed of Appointment. This was disclosed by a comparison between (i) the advice in the December Letter, if one reads the December Letter (as the Master did at Paragraph 23) with the error therein notionally corrected, and (ii) the Deed of Appointment as executed. This was also the evidence of Mr Sharp; see paragraph 39 of his first witness statement. In that first witness statement Mr Sharp is less than clear as to who actually made the error in the drafting of the Deed of Appointment. This however is clarified at paragraph 17 of the third witness statement of Mr Sharp, where Mr Sharp identifies that the drafting error was his own.
79. I do not see however that this had the effect of disapplying the requirement for convincing proof that the Trustees did have the Required Intention when they signed the Deed of Appointment. As I have already pointed out, it was an important feature of the present case that it was Mr Sharp who dealt, in a principal role, with the Deed of Appointment. If Mr Sharp had been a trustee of the Estate, it seems to me that it would more or less have followed, from the error which he made in the drafting of the Deed of Appointment, that he could be taken to have had the Required Intention when he signed the Deed of Appointment. Mr Sharp was not however one of the Trustees. It had to be demonstrated that the Trustees had the Required Intention. This was a different evidential exercise. Given that it was clear, on the evidence, that Catherine and, in particular, the Claimant had limited involvement with the Deed of Appointment, it seems to me that the case remained one where convincing proof was required that each of the Claimant and Catherine had the Required Intention when each signed the Deed of Appointment.

80. In these circumstances I do not think that it can be said that the Master went wrong in applying a requirement for convincing proof to the Claim. In doing so, the Master was doing no more than following the clear guidance provided by the authorities which she cited. As I have said, I do not think that it can be said that the case was one where the requirement for convincing proof could be said to have been disappplied.
81. As with the first limb of the first ground of appeal Mr Burton included in this part of his submissions his criticisms of the way in which the Master dealt with the evidence. Mr Burton's point was that the Master's decision on the evidence could only be explained on the basis that the Master applied a different, and higher standard of proof than the civil standard and/or had insufficient regard to the application of the correct standard of proof. As with the deployment of these criticisms of the Master's dealings with the evidence in relation to the first limb of the first ground of appeal, it seems to me that the substance of these criticisms belongs to the second ground of appeal. As such I will return to these criticisms when dealing with the second ground of appeal. As with the first limb of the appeal however, I do not think that any of these criticisms, if valid, demonstrate that the Master applied the wrong standard of proof. To the contrary, and as with the first limb, it seems to me quite clear from the terms of the Judgment that the Master applied the correct standard of proof.
82. I therefore conclude that there was no failure by the Master to apply the correct standard of proof to the Claim. Accordingly, the second limb of the first ground of appeal fails. It follows that the first ground of appeal fails.

#### The second ground of appeal – analysis

83. Although the second ground of appeal is, in the grounds of appeal, broken down into four sub-grounds, the essential argument is that the Master misdirected herself on the evidence. In these circumstances I find it easiest to deal with the second ground of appeal as a whole, without dividing my analysis between the sub-grounds.
84. The essential issue which the Master had to decide, in terms of the evidence before her, was whether it had been demonstrated that each of the Trustees had the Required Intention when they signed the Deed of Appointment. In the Judgment, the Master considered first whether the Required Intention had been demonstrated in the case of the Claimant (Paragraphs 45-52) and second whether the Required Intention had been demonstrated in the case of Catherine (Paragraphs 53-55). I will take the same course in my review of the Master's analysis of the evidence.
85. In relation to my review of the Master's analysis there is an important preliminary point to be made. If the Master had decided the Claim after hearing oral evidence, with cross examination of the witnesses, my ability to interfere with the Master's evaluation of that evidence would have been severely circumscribed. It would not have been open to me, without good reason, to interfere with the Master's findings on the evidence. The Master would have heard all of the evidence, and seen all the witnesses. I would not have been in the same position. The difference in the present case is that the evidence of the relevant witnesses was confined to their witness statements. I am therefore, as it seems to me, in as good a position as the Master to consider that evidence. I am also in a position to consider the Master's findings on the evidence without being subject to the disadvantage of not having seen and heard the relevant witnesses.

86. With that preliminary point made, I turn to the question of whether the evidence demonstrated that the Claimant had the Required Intention when she signed the Deed of Appointment. It will be recalled that the Claimant made two witness statements; the first dated 22<sup>nd</sup> February 2022, the second (further to the May Directions) dated 17<sup>th</sup> June 2022.
87. The Master commenced her analysis with the evidence given by the Claimant in her first witness statement. It is easiest simply to set out the Master's analysis of this evidence, at Paragraphs 45-47:
- “45. Ms Laird's first witness statement sets out her intention in paragraph 6, where she confirms that she has read Mr Sharp's first witness statement, and continues:*
- “I confirm that my intention in executing the Deed was as explained in his statement in that the Deed should only have appointed the tax-bearing assets onto the life interest trust, however, there was a clerical error which meant that all of the Deceased's estate was appointed on the life interest trust.”*
- 46. Neither this statement nor Mr Sharp's first statement contains any evidence as to:*
- (1) the information and advice (oral or written) provided by Mr Sharp to Ms Laird in relation to the Deed;*
- (2) Ms Laird's instructions to Mr Sharp in respect of the Deed.*
- 47. Furthermore, the documents in evidence do not include any correspondence of any form (including internal notes) to or from Ms Laird, nor any attendance notes recording conversations between her and Mr Sharp.”*
88. I believe that the reference in Paragraph 45 should have been to paragraph 5 of the Claimant's first witness statement. Paragraph 6 of the Claimant's first witness statement contains her evidence that it was clear that the Deed of Appointment contained a clerical error and her request for an order for rectification. It was in paragraph 5 of her first witness statement that the Claimant gave evidence in relation to what she said was her intention at the time when she signed the Deed of Appointment.
89. Mr Burton submitted that the evidence in paragraph 5 of the Claimant's first witness statement should have been all that was required, on the basis that the Claimant was the person best placed to give evidence of her subjective intention. Beyond that, Mr Burton accused the Master of de-contextualising the evidence. His point was that there was ample evidence in the documents to support the evidence of the Claimant that she did have the Required Intention or, so far as necessary, from which the inference could be drawn that the Claimant had the Required Intention. Mr Burton defended the conciseness of the evidence on the basis that the Claim was unopposed and on the basis that it was clear that there had been a mistake in the drafting of the Deed of Appointment; namely the clerical error identified by Mr Sharp.
90. I have already accepted that an error was made in the drafting of the Deed of Appointment, as identified by Mr Sharp. Beyond that, I do not accept any of Mr Burton's submissions, so far as they concern the Claimant's first witness statement. The problem with the Claimant's first witness statement, specifically at paragraph 5, seems to me to have been an obvious one. The Claimant commenced her evidence in

paragraph 5 of her first witness statement by saying that she had read Mr Sharp's first witness statement. What was clear from Mr Sharp's first witness statement was that he was the person within SM who was principally responsible for dealing with the Deed of Appointment. There was however nothing in Mr Sharp's witness statement which explained what dealings he had with the Claimant in relation to the Deed of Appointment. There was no evidence of the Claimant giving him any instructions in relation to the Deed of Appointment. There was no evidence of Mr Sharp giving any explanation of the Deed of Appointment to the Claimant. The December Letter was not, so far as I can see, sent to the Claimant, and there is no document which contains or evidences any explanation of the Deed of Appointment being given by Mr Sharp to the Claimant. There was a reference to advice given to the Executors (the Trustees) in paragraph 40 of Mr Sharp's first witness statement but, and this is symptomatic of much of the evidence relied upon by the Claimant in this case, it was a general reference, giving no clue as to what advice was given, and when.

91. In these circumstances the obvious question which arose was how the Claimant was able to assert, in paragraph 5 of her first witness statement, that she did have the Required Intention. There was nothing in her first witness statement, and there was nothing in Mr Sharp's first witness statement which explained how the information was communicated to the Claimant that the Deed of Appointment was only intended to appoint to Catherine a life interest in the income from the IHT Liable Assets.
92. Nor was this deficiency made good in any of the contemporaneous documents. I have already mentioned that the December Letter was not, so far as I can see, sent to the Claimant. Mr Burton took me to the IHT400 Form, on the basis that it showed a treatment of the assets in the Estate consistent with what Mr Sharp had said the Deed of Appointment was intended to achieve. I take the point, but I do not think that this document can be relied upon as the basis of the Claimant's alleged knowledge of what the Deed of Appointment was intended to achieve. There was no such evidence from the Claimant in her first witness statement. The Claimant did not say, in her first witness statement, that her knowledge of what the Deed of Appointment was intended to achieve came from the IHT400 Form. Beyond this, I was not taken to any other document which explained how the Claimant could have formulated the Required Intention, or which corroborated what the Claimant said in paragraph 5 of her first witness statement.
93. Mr Burton also sought to rely on the fact that the Claimant and Mr Sharp worked together in the same practice, and were working for the same estate, namely the Estate. I do not accept that this was a sufficient basis to infer that Mr Sharp had communicated to the Claimant the intended purpose of the Deed of Appointment. In circumstances where the Claimant and Mr Sharp had conspicuously failed to say this in their first witness statements, I do not see how it was appropriate for the Master to infer this from the fact that both worked in the same practice and were concerned with the same case.
94. I can see no flaw in the Master's summary of the position in Paragraphs 46 and 47. Indeed, I agree with this summary. Putting the matter at its lowest, it seems to me that the Claimant's evidence, in paragraph 5 of her first witness statement, required further explanation. Without such further explanation, I cannot see any basis on which the Master was obliged to accept that evidence. By reference to the evidence in the first

witness statement of Mr Sharp and the contemporaneous documents, the evidence of the Claimant did not, without further explanation, seem to me to be credible.

95. An interesting question which arises is whether the Master would have been entitled simply to dismiss the Claim, on the basis of the evidence as it stood at the date of the hearing of the Claim, by reason of the lack of explanation of how the Claimant was able to say what she did say in paragraph 5 of her first witness statement. I am inclined to think that the Master would have been so entitled, but I do not decide the point because the Master gave the Claimant the opportunity to retrieve the position, by the May Directions.

96. This therefore brings me on to the Master's analysis of the Claimant's second witness statement and Mr Sharp's third witness statement, served in response to the May Directions. The Master's analysis is at Paragraphs 48-52. At Paragraph 48, the Master set out the material parts of the Claimant's second witness statement. It is therefore convenient simply to quote Paragraph 48:

*"48. Ms Laird's second witness statement sets out her knowledge and intentions in paragraphs 5 to 8:*

*5. I was Mr Sharp's supervising partner so I knew him well, and we had worked together for many years. Mr Sharp was an experienced and longstanding associate solicitor, so it was entirely normal for him to prepare documents without me specifically checking them.*

*6. I cannot recall precisely what Mr Sharp said to me at the time I signed the deed. I frequently acted as executor and trustee, so was signing and discussing documents with staff, on a daily basis.*

*7. I think I would have read the document, as I read most of the documents that crossed my desk. However, in this case, I would not have known, just reading and signing the document, whether or not it had been drafted correctly, without seeing the will and discussing the matter at length with Mr Sharp, which I do not recall doing.*

*8. I would have been reliant upon Mr Sharp to draft the document in such a way so as to appoint the correct portion of the estate, and to advise me as to the effect of the document, not least because I was not dealing with the administration of the estate on a daily basis so would not have had the information at my fingertips."*

97. Pausing at this point, one can see that the Master's concerns over the first round of evidence were entirely justified. It was clear from the Claimant's second witness statement that she had no real recollection of the circumstances of her signing of the Deed of Appointment. It was also clear that the Claimant did not have day to day involvement with the administration of the Estate which, in turn, confirmed that the case was not one where it could safely be assumed that the Claimant must have picked up knowledge of the intended purposes of the Deed of Appointment from her dealings with the Estate and with Mr Sharp.

98. The Master then proceeded to her analysis of the further evidence of the Claimant and Mr Sharp, in Paragraphs 49-52. I have set out these Paragraphs earlier in this Judgment, but I repeat them for ease of reference:

*"49. The effect of Ms Laird's evidence is that, when executing the Deed, she had no knowledge of what was intended to be achieved by it. Although she says*

*that she relied on Mr Sharp to advise her, she does not state that he did. I am not therefore satisfied that she had any intention as to what she was achieving by executing the Deed. Her only intention was to sign the document which Mr Sharp put before her to sign.*

50. *Her evidence in her second statement is also, in my judgment, inconsistent with that in her first witness statement, such that it is difficult to understand how she could have signed the statement of truth in the first witness statement.*
51. *Ms Laird's second witness statement also sets out her understanding of the expression "tax bearing assets" as being, unsurprisingly, assets in respect of which inheritance tax would be paid. There is no reference by her to its meaning in the context of the deceased's estate i.e. assets in respect of which APR or BPR was not available, or indeed any indication that she knew that the estate included assets in respect of which these reliefs could be claimed. Indeed, if she had understood what Mr Sharp says he was intending to achieve by the Deed, it is difficult to see how having read the Deed, she could have signed it.*
52. *I have taken into account that Mr Sharp in his third witness statement (at para 14) says that he recalls telling Ms Laird that the intention of the Deed was to appoint the taxbearing assets only to Catherine on a life interest trust, and that this did not constitute an appointment of the whole estate to her. No details are given, and there are, as noted, no file notes or any other records of any conversations between Ms Laird and Mr Sharp. In my judgment, the inference to be drawn from the evidence as a whole is that Ms Laird delegated matters in their entirety to Mr Sharp, and lacked any relevant intention when executing the Deed."*

99. At this point, I do find myself in disagreement with the analysis of the Master. I say this for the following reasons.
100. So far as the analysis in Paragraph 49 is concerned, I agree with what the Master said in the first two sentences. Taken in isolation, I cannot see that the Claimant's evidence established that the Claimant had the Required Intention. It could not do so, given the Claimant's lack of recollection.
101. Moving on to the third and fourth sentences of Paragraph 49 the Master was not satisfied that the Claimant had any intention as to what she was achieving by executing the Deed of Appointment. Her only intention was to sign the document Mr Sharp put in front of her. Mr Burton criticised this finding, in the context of his first ground of appeal. His argument was that the Master found that the Claimant lacked any or any relevant subjective intention when signing the Deed of Appointment, which Mr Burton described as plainly wrong. I do not accept this criticism, on its own terms. The Master's finding, in Paragraph 49, was that the Claimant intended to sign the document which Mr Sharp put before her for signature. If one took the Claimant's evidence in isolation, it seems to me that this finding was amply justified. Given that the Claimant could not recall what she was told by Mr Sharp about the Deed of Appointment, the obvious finding was that her only intention was to sign the document which Mr Sharp put before her. There was no absence of a finding of an intention. It seems quite clear to me that the Master was making a finding that the intention of the Claimant, when she signed the Deed of Appointment, was to give effect to the Deed of Appointment as

drafted. Indeed that finding was the only possible finding on the evidence, if there was no evidence of anyone having advised the Claimant, before she signed the Deed of Appointment, that the appointment of a life interest to Catherine was intended to be restricted to the IHT Liable Assets.

102. This assumes however that it was legitimate to consider the Claimant's evidence in her third witness statement in isolation. It is here, specifically, that I differ from the Master in my own analysis of the evidence. The Claimant's evidence fell to be considered with the evidence in the third witness statement of Mr Sharp. In particular, it was necessary to consider the following evidence, in paragraphs 13 and 14 of the third witness statement of Mr Sharp:

*“13. The Master has then asked as to the information and advice (both oral and written) provided by me to the Claimant, Ms Laird, in relation to the Deed. I recall that the discussion with her immediately prior to her executing the Deed was brief, due to a very busy working period in our department, and I was requesting her to sign several items of paperwork on a number of different files.*

*14. I recall explaining to Ms Laird that the intention of the Deed was to appoint the tax-bearing assets only to the First Defendant on a life interest trust, and that this did not constitute an appointment of the whole estate to her.”*

103. This evidence included the important information that Mr Sharp had a discussion with the Claimant immediately prior to her signing the Deed of Appointment. As it happens, that evidence may be said to be corroborated by the fact that Mr Sharp's name appears on the Deed of Appointment as witness to the signature of the Claimant. As such, Mr Sharp must have been present when the Claimant signed the Deed of Appointment. So far as the content of this discussion is concerned, Mr Sharp gave the important evidence that he did explain to the Claimant that the intention of the Deed of Appointment to appoint the IHT Liable Assets to Catherine on a life interest trust, and that this did not constitute an appointment of the whole Estate to her.
104. The Master did not disregard this evidence. She dealt with this evidence at Paragraph 52. The Master noted that no details were given of what the Claimant was told by Mr Sharp and that there were no file notes or any other records of any conversations between the Claimant and Mr Sharp. These were legitimate points to make, but I do not see that they justified rejection of Mr Sharp's evidence that he had a discussion with the Claimant, immediately prior to her signing the Deed of Appointment, in which he explained to the Claimant that the intention of the Deed of Appointment was to appoint a life interest to Catherine in the IHT Liable Assets. This evidence was unchallenged. Unless the evidence was incredible, and the Master did not make a finding that this evidence was incredible, it seems to me that the Master was required to accept this evidence.
105. If, as I think is correct, the Master was obliged to take account of Mr Sharp's evidence of his discussion with the Claimant immediately before she signed the Deed of Appointment, this seems to me to affect the points made by the Master in Paragraphs 50 and 51.



106. In Paragraph 50, the Master referred to the inconsistency between the Claimant's two witness statements. I can see how the Master arrived at this conclusion. If one compares the two witness statements, in isolation, there is an obvious inconsistency or, which may be a more accurate way of putting the matter, an obvious question mark. In the first witness statement the Claimant gave unequivocal evidence, in paragraph 5, that she had the Required Intention. In paragraph 6 of her second witness statement the Claimant gave evidence that she could not recall precisely what Mr Sharp told her when she signed the Deed of Appointment. Although the word "*precisely*" was used, the Claimant appears to have had no recollection of anything said to her by Mr Sharp. The obvious question which arises is how the Claimant was able to be so unequivocal as to her intention, in paragraph 5 of her first witness statement, given the lack of recollection demonstrated by her second witness statement.
107. While the Claimant gave no evidence of her own, by reason of her lack of recollection, of receiving advice on the Deed of Appointment from Mr Sharp, she did give evidence that she would have relied on Mr Sharp to advise her as to the effect of the Deed of Appointment. Putting this evidence together with Mr Sharp's evidence of the discussion which he had with the Claimant immediately prior to her signing the Deed of Appointment, there was, as it seems to me, just about enough to reconcile the terms of the Claimant's first and second witness statements. If the Claimant was advised by Mr Sharp as to the intended effect of the Deed of Appointment, before she signed the Deed of Appointment, it then becomes possible to accept the Claimant's evidence in her first witness statement that she did have the Required Intention when she signed the Deed of Appointment.
108. I think that it is important to add the point that the evidential position was somewhat less than satisfactory. In paragraph 7 of her second witness statement the Claimant said that she thought that she had read the Deed of Appointment. She then went on to say that she would not have known whether or not the Deed of Appointment had been drafted correctly, without seeing the Will and discussing the matter at length with Mr Sharp, which she did not recall doing. If however one accepts the evidence of Mr Sharp that there was a discussion immediately prior to the Claimant signing the Deed of Appointment, in which Mr Sharp explained the limited nature of the life interest to be appointed to Catherine, one might have expected this discussion to have alerted the Claimant to the error in the Deed of Appointment, when she came to read the document. This expectation might be said to be consistent with the content of paragraph 7 of the Claimant's witness statement. If the true intention of the Deed of Appointment was explained by Mr Sharp to the Claimant, before she signed the Deed of Appointment, the question might be asked as to how the Claimant missed the error, when she read the Deed of Appointment. Beyond this, another question which arose was how the Claimant was able to be so equivocal as the existence of the Required Intention, in paragraph 5 of her first witness statement. When the Claimant made her first witness statement, she had only read the first witness statement of Mr Sharp, which said nothing about his conversation with the Claimant prior to her signing the Deed of Appointment. How then, the question might be asked, was the Claimant able to be so equivocal, in her evidence of intention, in her first witness statement?
109. Beyond this, one can see that the evidence in paragraph 5 of the Claimant's first witness statement was, putting it generously, incomplete. With the benefit of the Claimant's evidence in her second witness statement, it becomes apparent that the

Claimant was not strictly able to confirm whether she had the Required Intention or not. She did not have sufficient recollection to speak directly to the question. If the evidence had been prepared properly, first time round, Mr Sharp should have given the evidence, in his first witness statement, which actually appears in his third witness statement; namely that he had a discussion with the Claimant, before she signed the Deed of Appointment, in which he explained to the Claimant that the intention of the Deed of Appointment was to appoint the tax-bearing assets only to the Claimant on a life interest trust. For her part, the Claimant should have given the evidence, in her first witness statement, which actually appears in her second witness statement; namely that she would have relied upon Mr Sharp to advise her as to the effect of the Deed of Appointment. On this basis the Claimant could then have stated her belief that she did have the Required Intention when she signed the Deed of Appointment, although it may be said that this last point was a matter for submission rather than evidence. At the most, the Claimant could only have stated a belief, because her own lack of recollection did not permit her to state unequivocally that she had the Required Intention when she signed the Deed of Appointment.

110. Although the evidential position was unsatisfactory, one ultimately comes back to the point that the evidence in support of the Claim was unchallenged. There was no cross examination in which questions of the kind set out in my previous paragraph could have been investigated. If the evidence of the Claimant and Mr Sharp was taken as a whole, it seems to me that, despite the problematic nature of the Claimant's evidence, there was not in fact an inconsistency between the first and second witness statements of the Claimant.
111. I do not think that I should leave my consideration of Paragraph 50 without passing comment on Mr Burton's attack on this part of the Judgment. The skeleton argument in support of the Appeal pulls no punches in its criticisms of the Master. The attack on Paragraph 50 is however notably aggressive. I quote paragraphs 53-56 of the skeleton argument:
- “53. *The Master's observation at paragraph [50] of the Judgment is deeply troubling and the parties have no way of knowing the extent to which this has undermined the entire evaluating of the evidence.*
54. *There is nothing in Ms Laird's 2<sup>nd</sup> statement that is inconsistent with her 1<sup>st</sup>, and there is certainly nothing in paragraphs [5] to [8] of her 2<sup>nd</sup> statement, referred to at Jgt [48] that is inconsistent with the 1<sup>st</sup>. The Master does not identify any inconsistencies. Given the seriousness of the observation at [50] the Master was bound to identify inconsistencies and how, if at all, these amounted to contradictions.*
55. *What inconsistencies or contradictions led the Master to doubt the truthfulness of Ms Laird's evidence? Why did they make it difficult to understand how Ms Laird was able to verify her evidence as truthful? Does this attack on Ms Laird's credibility go to her 1<sup>st</sup> or 2<sup>nd</sup> statement, to some but not all paragraphs of each statement or to the totality of her evidence? What effect if any does this have on Mr Sharp's evidence and what effect if any does his evidence have on the issue? It is completely unacceptable that these and other questions are left completely unconsidered and unanswered in the Judgment.*
56. *There was simply no basis, or no proper basis, for the Master to reach the view that she did in paragraph [50] of the Judgment.”*

112. I have no difficulty in seeing what it was that troubled the Master, in terms of the relationship between the evidence in the Claimant's first witness statement and the evidence in the Claimant's second witness statement. I have explained the problematic nature of this evidence above. I respectfully disagree with the Master that there was, given the unchallenged nature of the evidence, an inconsistency between the first and second witness statements. If the third witness statement of Mr Sharp is taken into account, and if one is prepared to accept (as I am) that paragraph 5 of the first witness statement of the Claimant is overstated and poorly expressed, rather than wrong, I think that the first and second witness statements of the Claimant can be reconciled, and should not be treated as inconsistent. It seems to me however that the Claimant is in no position to accuse the Master of anything "*completely unacceptable*" in the Judgment. To my mind it was the problematic nature of the Claimant's evidence which created the problems in the present case, not the Master's reasoning.
113. Turning to Paragraph 51 I do not agree with the Master's reasoning. The Master made reference to the Claimant's evidence, in paragraph 3 of her witness statement, that she was very familiar with the expression "*tax bearing assets*". The Master made two points in this context. The first was that there was no reference by the Claimant to the meaning of this expression in the context of the Estate. The second was that if the Claimant had understood what Mr Sharp had said he was intending to achieve by the Deed of Appointment, it was difficult to see how the Claimant, having read the Deed of Appointment, could have signed it.
114. So far as the first of these points is concerned, I take it to be a reference to the absence of evidence from the Claimant that she actually understood that, in the particular case of the Deed of Appointment, the appointment of a life interest to Catherine was intended to be limited to the IHT Liable Assets. This is a legitimate point, if the Claimant's evidence is taken in isolation but, as I have already explained, if the evidence in Mr Sharp's third witness statement is taken into account, I think that there is sufficient to demonstrate that the Claimant, notwithstanding her own lack of recollection, did have the requisite understanding of the intended limitation of the assets subject to the life interest. So far as the second point is concerned, it is a point which I have already made myself, in my identification of the problematic nature of the Claimant's evidence. As I have already explained however, in circumstances where the evidence in support of the Claim was unchallenged and notwithstanding that I can see why the Master reasoned as she did, I do not think that a point of this kind was available to the Master as a reason for finding that the Required Intention had not been demonstrated.
115. The Master summarised the position at the end of Paragraph 52. The inference which she drew from the evidence as a whole was that the Claimant delegated matters in their entirety to Mr Sharp, and lacked any relevant intention when executing the Deed. In a case where the evidence was unchallenged, I do not think that it was open to the Master to draw an inference of this kind. In my view, and if the evidence of the Claimant and Mr Sharp is put together, there was just about enough in the present case to get the Claimant home, in terms of demonstrating that the Claimant had the Required Intention when she signed the Deed of Appointment. In order to reach a different conclusion, it seems to me that the Master was effectively obliged to reject the critical evidence of Mr Sharp that he did explain to the Claimant that the intention of the Deed of Appointment

was to appoint only the IHT Liable Assets to Catherine on a life interest trust, and that this was not an appointment of whole of the Estate to her. In the absence of a finding that this evidence was incredible, and I do not read the Judgment as containing such a finding, it seems to me that the Master was obliged to accept the evidence of Mr Sharp which, in its turn, provided a way of resolving the problems with the Claimant's evidence.

116. In summary, and although my reasoning does not bear much resemblance to the submissions made to me on the Appeal, I conclude that the evidence did demonstrate that the Claimant had the Required Intention when she signed the Deed of Appointment. I conclude that the Master was wrong to decide that this had not been demonstrated.
117. I turn to the question of whether the Master was right to decide that Catherine lacked the Required Intention when she signed the Deed of Appointment. I can take this point more shortly. Catherine made only one witness statement in relation to the Claim. She did make a second witness statement, but its contents appear to have been confined to the applications made by the Defendants, which were also before the Master at the hearing of the Claim. At Paragraph 55 the Master referred to evidence from Catherine, in her second witness statement, confirming that she did not give any instructions to Mr Sharp as to the content of the Deed of Appointment. I am not sure which part of the second witness statement the Master had in mind. I have not been able to find any such evidence in Catherine's second witness statement. I raised a query to this effect when I provided a draft of this judgment for corrections. In response to this query, it was suggested, on behalf of the Claimant, that the Master intended to refer to paragraph 5 of Catherine's first witness statement, which makes it clear that Catherine relied upon SM's advice and guidance. This suggestion may well be correct. In any event there does not appear to be any evidence of Catherine giving instructions in relation to the content of the Deed of Appointment. As such, it appears that the Master was right to find that Catherine did not give any instructions to Mr Sharp as to the contents of the Deed of Appointment, even if her reference to the relevant part of Catherine's evidence was wrong.
118. Catherine's evidence, in her first witness statement, was short. The material parts of this witness statement were paragraphs 3-10, which I quote in full:
  - “3. *Throughout 2019 I was represented and advised as Executor and Trustee by SM. Following correspondence from Ben Sharp of SM in December 2019 and relying on SM's advice, I signed and returned a Deed of Appointment which was dated 31 December 2019 ("the Deed").*
  4. *My understanding of SM's correspondence and advice at that time was that the purpose of and intention behind the Deed was to reduce the inheritance tax payable in my late husband's estate. This was possible as I was his spouse.*
  5. *I am a lay Executor and Trustee rather than a legal professional or expert and was happy to sign and return the Deed as requested, and to rely upon SM's advice and guidance. I had no reason to question the advice I was given or the way in which the Deed had been drafted.*
  6. *In response to queries from my sister, Dr Jennifer Stutley, and my current solicitors, Royds Withy King ("RWK"), SM initially confirmed that the*

*effect of the Deed was that the entire residuary estate had been appointed out onto a life interest trust in my favour.*

7. *At the end of March 2021 SM wrote to RWK to explain that they had identified a drafting error in the Deed and in fact only the tax bearing assets should have been appointed out, not the whole residuary estate.*
8. *I understand from my solicitor, from SM's correspondence and the Witness Statement filed in these proceedings by Benjamin Sharp that the Deed contained a clerical/drafting error so that the "Trust Fund" was incorrectly defined. The effect of this was that the whole residuary estate was appointed out on a life interest for me rather than only the income from any tax bearing assets.*
9. *I was not aware of this drafting error until it was notified to RWK by SM at the end of March 2021. My intention in signing the Deed was to mitigate the inheritance tax payable in the estate, following SM's advice. That is: I was guided by and relied upon SM's advice in relation to the Deed and signed it accordingly.*
10. *As SM have now advised that the Deed contained a drafting error and given that in signing it initially I relied upon their professional advice, I do not contest the claim for rectification."*

119. The Master considered, at Paragraph 54, that this evidence fell short of showing the Required Intention. I have already quoted Paragraphs 54 and 55, but I repeat them for ease of reference. At Paragraph 55 the Master said this:

*"54. This in my judgment falls short of showing the specific intention that the trustees are said to have had, namely that only the tax-bearing assets would be appointed to Catherine. The general intention referred to by her was of course achieved by the Deed as executed, because the entirety of the residuary estate thereby became subject to spousal relief."*

120. It is convenient to take this reasoning together with the reasoning in Paragraph 55, where the Master said this:

*"55. Catherine's second witness statement confirms that she did not give any instructions to Mr Sharp as to the contents of the Deed. The only written information she received from him was his letter dated 20 December 2019, enclosing the draft Deed. The letter itself contains a confusing error (the omission of the word "relief") and it is clear from Catherine's evidence that she did not understand it. In my judgment it is not possible on this evidence to attribute to Catherine an intention, when she executed the Deed, that only assets which did not attract APR or BPR would be appointed from the discretionary trust to a life interest trust in her favour."*

121. I am unable to agree with the reasoning of the Master in Paragraphs 54 and 55. Catherine's evidence, at paragraph 4 of her witness statement, was that the purpose and intention behind the Deed of Appointment was to reduce the inheritance tax payable on the Estate, which was possible because Catherine was Robert's spouse. In paragraph 5 of her witness statement Catherine's evidence was that she relied on the advice and guidance of SM in relation to the Deed of Appointment, which she had no reason to question. At paragraph 9 of her witness statement Catherine's evidence was that her intention in signing the Deed of Appointment was to mitigate the inheritance tax

payable on the Estate, “*following SM’s advice*”. Catherine says that she was guided by that advice and relied on it.

122. The question then becomes what advice was given to Catherine by SM prior to her signing the Deed of Appointment. There is an email sent by Mr Sharp to Elizabeth on 31<sup>st</sup> December 2019, which refers to Mr Sharp having spoken to Catherine that morning. In paragraph 12 of his third witness statement however, Mr Sharp says that he does not recall this conversation, although he does say that it was a telephone conversation, which is not apparent from the email.
123. There is however also the December Letter, which gave Catherine advice on the Deed of Appointment. While the December Letter contained a notable error, in making reference to assets not attracting inheritance tax into a trust in favour of Catherine, it can be said that the mistake is corrected in the following sentence of the December Letter. It can also be said that if one is prepared to read the December Letter with the error notionally corrected, as the Master was and as I am, it is not unreasonable to accept that Catherine read the December Letter in the same way. On this basis it becomes possible to find that Catherine was advised by SM that the intended effect of the Deed of Appointment was to appoint to her, by way of life interest, the IHT Liabile Assets. Given that Catherine was clear in her evidence that she relied on the advice and guidance of SM in signing the Deed of Appointment, it seems to me that it then becomes possible to find that Catherine signed the Deed of Appointment with the Required Intention. In my view, and keeping in mind that there was no challenge to Catherine’s evidence, this is the correct analysis of Catherine’s evidence.
124. As with the Claimant’s evidence, Mr Burton sought to argue that if one looked at the totality of the evidence it was clear that Catherine signed the Deed of Appointment with the Required Intention. On my reasoning the Claimant does not need to rely on this argument, but I should deal with the argument. I do so because, as with the Claimant’s evidence, Mr Burton again accused the Master of de-contextualising the specific evidence on which she concentrated. I do not accept this argument, or the accusation of de-contextualisation made against the Master. It is not necessary individually to go through all the evidential items relied upon by Mr Burton. As with the Claimant’s evidence, it seems to me that if it was to be demonstrated that Catherine did have the Required Intention when she signed the Deed of Appointment, the evidence which was actually capable of demonstrating this was confined to the evidence to which I have referred above. If this evidence was insufficient, it seems to me that that was the end of the matter, so far as proving the Required Intention was concerned. On this hypothesis there was nothing in what Mr Burton characterised as “*the totality of the evidence*” which could retrieve the position.
125. Returning to the Master’s reasoning, at Paragraphs 54 and 55, I do not think that Catherine’s evidence did fall short of showing the Required Intention. Applying the analysis of Catherine’s evidence in her witness statement which I have set out above, I think that it is possible to read Catherine’s evidence as demonstrating the Required Intention. Equally, I do not think that Catherine’s evidence is correctly read as demonstrating no more than the general intention referred to by the Master in Paragraph 54. If it is possible to read Catherine’s evidence as demonstrating the Required Intention, then it seems to me, in the absence of any challenge to Catherine’s evidence, that this is how it should be read.

126. In Paragraph 55 the Master refers to the confirmation from Catherine, in her second witness statement, that she did not give any instructions to Mr Sharp as to the content of the Deed of Appointment. As I have said, I have not been able to find this confirmation in Catherine's second witness statement but, as I have also said, I have not been able to find any evidence of Catherine giving instructions to Mr Sharp as to the content of the Deed of Appointment. There is however the December Letter, which is evidence of the advice given by Mr Sharp to Catherine as to the intended purpose of the Deed of Appointment. The December Letter does indeed contain a confusing error, as the Master noted. For the reasons which I have set out above however, I think that the December Letter can and should be read as having communicated to Catherine the correct intended purpose of the Deed of Appointment. I do not think that it is clear from Catherine's evidence that she did not understand the December Letter. It seems to me that this was a conclusion which could only have been justified if Catherine's evidence had been subjected to cross examination. Whether such a conclusion would have been justified, following cross examination, would of course have depended upon an assessment of that cross examination. Catherine's evidence was however unchallenged, with the consequence that her evidence had to be assessed on the basis of a reading of her witness statement and, so far as the same were relevant, the remainder of the witness statements and the documents which were in evidence.
127. On the basis of my own reading of Catherine's evidence and the December Letter I find myself unable to agree with the Master's conclusion that it was not possible to attribute the Required Intention to Catherine when she signed the Deed of Appointment. My own conclusion is that this is possible, and is the correct reading of Catherine's evidence.
128. There is one other point which I should mention in this context. Paragraph 2(6) of the May Directions required further explanation from each of Catherine and the Claimant of the following matters:
- (i) *whether they read the Deed before signing it;*
  - (ii) *if so, what they understood its effect to be by reference to its wording, including the use of the term "Trust Fund";*
  - (iii) *if and to the extent they did not read it, the basis of their understanding as to its effect (including the documents read by them in reaching that understanding).*
129. The Claimant served her own second witness statement and the third witness statement of Mr Sharp in response to the May Directions. So far as I am aware however there was no further evidence served from Catherine. Catherine's second witness statement is dated 22<sup>nd</sup> April 2022 and was not, as I read the same, concerned with the Claim. This raises the question of whether the absence of further explanation from Catherine, in response to the May Directions, justified the Master's conclusion that it was not possible to attribute the Required Intention to Catherine. In my view this was not the position. It seems to me that the question of whether the Claimant had demonstrated that Catherine had the Required Intention when she signed the Deed of Appointment depended upon the evidence which was filed before the Master in this respect. In terms of Catherine's own evidence, the Claimant elected, so far as I am aware, to confine this evidence to Catherine's first witness statement. It seems to me that this election did not preclude a finding that the Catherine had the Required Intention when she signed the

Deed of Appointment. The election simply limited the direct evidence from Catherine which was available to support such a finding. The Master found that the available evidence fell short of establishing that Catherine had the Required Intention. For the reasons which I have set out, I disagree with this finding.

130. In summary and although, again, my reasoning does not bear much resemblance to the submissions made to me on the Appeal, I conclude that the evidence did demonstrate that Catherine had the Required Intention when she signed the Deed of Appointment. I conclude that the Master was wrong to decide that this had not been demonstrated.
131. It has not been necessary, in my reasoning as set out above, to engage with the detail of Mr Burton's wider arguments in support of the second ground of appeal. Essentially, I have differed from the Master in my reading of the evidence of the Claimant and Catherine. Mr Burton's arguments ranged more widely than this, criticising the overall approach of the Master to the evidence on a number of grounds. These arguments were ably advanced by Mr Burton in his oral submissions. I intend no disrespect to Mr Burton in saying that I do not regard it as necessary to go through these wider arguments in detail, not least because their foundation was in the arguments advanced in support of the first ground of appeal, which I have rejected. In summary, the position is that I do not accept the wider arguments of Mr Burton in support of the second ground of appeal. In my view the Master did not misapply the law to the evidence. In my view the Master did not apply the wrong standard of proof to the evidence. In my judgment, the Master did no more than go wrong in her reading of the evidence of the Claimant and Catherine.

#### The outcome of the Appeal

132. In my judgment, and for the reasons which I have given, the evidence in support of the Claim was sufficient to establish that both the Claimant and Catherine had the Required Intention when they signed the Deed of Appointment.
133. As I understand the position, the effective issue before the Master was whether the Required Intention had been demonstrated, on the part of both the Claimant and Catherine. So far as I am aware, there was no other issue concerning the right of the Claimant to the remedy of rectification in relation to the Deed of Appointment.
134. In these circumstances I accept the submission of Mr Burton that I can, and should set aside the Master's dismissal of the Claim and, in the exercise of my own powers, grant the remedy of rectification in relation to the Deed of Appointment, in the terms in which rectification is sought in the claim form by which this action was commenced.
135. The outcome of the Appeal is therefore as follows:
- (1) The appeal is allowed.
  - (2) I will set aside paragraph 1 of the Order, by which the Claim was dismissed.
  - (3) I will make an order for the rectification of the Deed of Appointment, so that clause 2.1 of the Deed of Appointment will read as follows:  
*"The income of all that part of the Trust Fund which does not attract any relief from Inheritance Tax given by the provisions of Chapter I or Chapter II of Part V of the Inheritance Tax Act 1984, or any modification or re-enactment of them, shall be paid to Catherine during her lifetime"*



136. I will hear the parties further, as necessary, on all matters consequential upon this judgment and on the terms of the order to be made consequential upon this judgment. I refer to the parties because, as I understand the position, there are questions of costs upon which the Defendants wish to be heard.

#### Postscript

137. There are four final points which I have to make in relation to the Appeal. The first two of these points are also relevant to other unopposed claims of this kind.
138. First, the court is not a rubber stamp in relation to unopposed claims, in particular where relief such as rectification is sought. I accept Mr Burton's point that the court's equitable discretion, in relation to the remedy of rectification, is not a general discretion and falls to be exercised in accordance with settled principles. The court is however entitled to subject a claim for rectification to careful scrutiny, which does not reduce simply because the claim is unopposed. While it is right to record that this was not true of Mr Burton's measured oral submissions in support of the Appeal, the written submissions in support of the Appeal did convey, at least to me, an unspoken note of indignation that the Master had not simply accepted that the Claim was proved, on the basis of what was said by the Claimant and Catherine in their witness statements. As my analysis in this judgment demonstrates, the evidence of both the Claimant and Catherine was nowhere near as straightforward as this. As matters turned out, and then only by virtue of the May Directions, it became apparent that the Claimant was not actually able to give direct evidence of her intention at the time when she signed the Deed of Appointment. The evidence of her intention emerged from a combination of Mr Sharp's evidence, which again was only available by virtue of the May Directions, and the Claimant's evidence, in her second witness statement, that although she could not recall what Mr Sharp told her at the time when she signed the Deed of Appointment, she would have relied on Mr Sharp to advise her as to the intended effect of the Deed of Appointment.
139. The key point is that the Master was quite entitled, in the present case, to subject the evidence to the level of scrutiny to which it was subjected. In other such cases, the parties should expect the same level of scrutiny. I have not decided whether the Master could simply have dismissed the Claim if she had not issued the May Directions but had instead proceeded to decide the Claim on the evidence as it stood prior to the May Directions. It may however be said that the Claimant was fortunate that the Master, by the May Directions, allowed the Claimant a second go at the evidence. In another case the claimant party may not be so fortunate.
140. Second, Mr Burton went so far as to submit, in his skeleton argument for the Appeal, that paragraph 6 of the Claimant's first witness statement ought to have been all that was required, on an uncontested paper based disposal hearing, on the basis that the Claimant was the person best placed to give evidence of her subjective intention. Mr Burton also characterised this evidence as concise, and legitimately concise. The Claimant gave evidence of her subjective intention in paragraph 5 of her first witness statement. As I have explained in this judgment, paragraph 5 of the Claimant's first witness statement was problematic. By reason of her lack of recollection, the Claimant was not in a position to give direct evidence of her intention at the time when she signed the Deed of Appointment. The Required Intention was only demonstrated by putting together the further evidence of the Claimant and Mr Sharp as to the

circumstances in which the Claimant came to sign the Deed of Appointment. Even then, what was said by the Claimant in paragraph 5 of her first witness statement may be said to have been more a matter for submission on the evidence, rather than actual evidence.

141. The key point is that the court was entitled in this case to see properly particularised evidence, which identified what each witness was able to say, and was not able to say, and why. Bald and unqualified statements of intention were not sufficient. The same applies to other cases of this kind. In the present case the original evidence was not properly particularised. It was only by reason of the May Directions that sufficient was ultimately done, in my judgment, to prove the Required Intention.
142. Third, the Master came in for a good deal of criticism in the Claimant's arguments in support of the Appeal, including the accusation that the Master, at Paragraph 50, dealt with the Claimant's evidence in a way which was "*completely unacceptable*". In my view, this and other criticisms of the Master were not justified. The only reasons why I have come to the conclusion that the dismissal of the Claim cannot stand are (i) because, in the absence of oral evidence being heard in this case, I am in the unusual position of being as well placed as the Master to assess the evidence, and (ii) because I have differed from the Master in my reading of the evidence.
143. Fourth, and finally, I have referred to the fact that neither *Long* nor *Coyne* were cited to the Master at the hearing of the Claim; see paragraph 57 of this judgment. When I provided a draft of this judgment for corrections, it was suggested, on behalf of the Claimant, that I should alter paragraph 57 to read as follows:
- "As the claim was unopposed, and the parties were not inviting the court to reject evidence, neither Long nor Coyne were cited to the Master at the hearing of the Claim"*
144. I accept this correction, so far as it concerns the actual hearing of the Claim, on 29<sup>th</sup> April 2022. I do not accept this correction, so far as it may be intended to apply to the situation as it stood following the May Directions. The Master made it quite clear, by the May Directions, that her preliminary view was that the evidence was insufficient to establish the Claim. As I understand the position, this resulted in the Claimant filing the further witness statements of the Claimant and Mr Sharp. As I also understand the position, this did not result in the Claimant citing either *Long* or *Coyne* to the Master. Given that the Claimant has argued, in the Appeal, that the Master should have accepted that the Claim was established by the first round of evidence, without the need for further evidence from the Claimant or Mr Sharp, and given that *Long* and *Coyne* have been cited in the Appeal in support of this argument, it seems to me that the Claimant should, following the May Directions, have drawn the attention of the Master to *Long* and *Coyne*. On the Claimant's case in the Appeal, the Claimant was filing further evidence in response to the May Directions without prejudice to her position that the first round of evidence was sufficient to establish the Claim. More generally, the May Directions should have signalled to the Claimant that the Master was, at least on the Claimant's case as it has been put in the Appeal, going wrong in her approach to the evidence. As such, it seems to me that it was incumbent upon the Claimant, consistent with her case in the Appeal, to have drawn the attention of the Master to *Long* and *Coyne*. As I have said, my understanding is that this did not happen, notwithstanding the terms of the May Directions.

