Neutral Citation Number: [2021] EWHC 1528 (Ch)

Case No: PT-2020-000521

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

PROPERTY, TRUSTS AND PROBATE LIST (ChD)

Rolls Building
7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

Date: 15 June 2021

Before :

DEPUTY MASTER DRAY

- -

Between :

(1) EQUIOM (ISLE OF MAN) LIMITED
(2) JOHN JEREMY CALLIN
(3) PETER CHARLES CROSSLEY

Claimants

- and –

(1) PETER CHRISTIAN VELARDE
(2) REBECCA VELARDE
(3) MATTHEW JULIAN VELARDE

Defendants

- -
- -

Clare Stanley QC (instructed by **Forsters LLP**) for the **Claimants**
Penelope Reed QC (instructed by **Mills & Reeve LLP**) for the **First Defendant**

Rodney Stewart Smith (instructed by **Brabners LLP**) for the **Third Defendant**
The Second Defendant did not appear and was not represented

Hearing date: 19 May 2021
- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand down is deemed to be 15 June 2021, 10.30am.

Deputy Master Dray:

1. The dispute in this case concerns the true construction of clause 7 of the Will dated 12 November 2007 of Patricia Moores ("Mrs Moores"). Mrs Moores died on 5 September 2017. Probate of her Will was granted on 13 November 2017.

2. The Will is governed by the law of the Isle of Man. It is, however, common ground that the relevant law is the same as English law, and I proceed on that basis.

3. Clause 7 of the Will reads:

> "I LEAVE DEVISE BEQUEATH AND **APPOINT** the whole of my real estate and the rest residue and remainder of my personal estate wheresoever situate and of whatsoever kind of or to which I shall be seised possessed or entitled at the date of my death **or over which I shall have any power of testamentary disposition whatsoever** … unto my children PETER CHRISTIAN VELARDE MATTHEW JULIAN VELARDE AND REBECCA VELARDE."

(bold emphasis added)

4. Mrs Moores' children are the Defendants to the present claim. I refer to them, without any disrespect, by their given/known names.

5. The Claimants are the trustees of a Settlement dated 11 July 1949, settled by Cecil Moores, the father of Mrs Moores.

6. By clause 2(c) of the Settlement Mrs Moores enjoyed a special power of appointment in respect of property described as the Patricia Trust Fund. This power could be exercised by deeds revocable or irrevocable, or by will or codicil.

7. Mrs Moores exercised this power twice during her lifetime.

8. First, by a Deed of Appointment dated 27 December 1981 ("the 1981 DOA"), expressed to be supplemental to the Settlement, Mrs Moores (then known as Mrs Martin) appointed (with effect from her death) the Patricia Trust Fund between Christian, Rebecca and Matthew. By clause 6 the appointment was expressed to be revocable by deed, will or codicil.

9. Secondly, by a Deed of Revocation and Appointment dated 20 August 1997 ("the 1997 DOA"), expressed to be supplemental to the Settlement and the 1981 DOA, Mrs Moores revoked the 1981 appointment and instead appointed (from and after her death) the Patricia Trust Fund on trust for Christian and Rebecca in equal shares, omitting Matthew. Again, by clause E the appointment was similarly revocable.

10. Around the time of the 1997 DOA Matthew was going through a divorce. Christian has suggested that a wish to avoid Matthew's ex-wife making a claim on Matthew's interest under the Settlement was the reason for the 1997 DOA. That may perhaps be so, although a curiosity is that Mrs Moores had made a will in 1993 leaving her residuary estate to her three children equally and no steps were taken in 1997 to revoke or alter that Will (which, I believe, remained in place until the 2007 Will with which I am concerned). The curiosity is all the greater given that I am led to understand that the (current) value of Mrs Moores' estate (which does not include the Patricia Trust Fund) is c.£40 million whereas the (current) value of the Patricia Trust Fund, the subject of the 1997 DOA, is rather less. Why, therefore, the concern about Matthew's share in the latter but not the former?

11. 10 years later Mrs Moores made the Will which is the subject of the present proceedings. The Will was drafted professionally by Dickinson Cruickshank, Advocates & Notaries in the Isle of Man, the firm that had drafted the two DOA. Mr George Moore (spelled in the singular and no relation of Mrs Moores) was instrumental in that regard. He had advised Mrs Moores for a number of years. He knew of the Settlement and the DOAs.

12. The dispute between the parties concerns the meaning and effect of clause 7 of the Will. Specifically, the issue is whether clause 7 operated to effect a revocation of the 1997 DOA and made a new appointment, giving Matthew an equal share of the Patricia Trust Fund along with his siblings and so diluting their respective shares from one-half to one-third.

13. The Claimants quite properly adopt a neutral stance. Christian maintains that the 1997 DOA was not revoked. Matthew contends otherwise. Rebecca has not actively participated in the proceedings but she supports Matthew's position.

14. I heard the trial on 19 May 2021 remotely by Microsoft Teams. The Claimants were represented by Clare Stanley QC, Christian by Penelope Reed QC and Matthew by Rodney Stewart Smith of counsel. I am most grateful to them all for their clear, focussed and helpful submissions, both written and oral.

15. The trial proceeded without any oral evidence but there are various witness statements in the bundle, including statements from both Christian and Matthew. I have had regard to all the material in reaching my decision, although as I explain below the statements have relatively little bearing on the issue of interpretation before me.

16. The basic principles of construction in relation to wills broadly mirror those applicable to the interpretation of contractual documents. They are well-known, not in dispute and do not need to be set out at length. In essence the quest is to find the testatrix's intention, this being assessed objectively having regard to the language of the will as a whole read in the light of the relevant factual matrix and with regard to the overall purpose of the instrument and common sense: *Marley v Rawlings* [2015] AC 129, Sup Ct.

17. One difference between bilateral contracts and unilateral instruments (such as wills) is that, whereas contracting parties may accept an obscurely drafted provision as a compromise to

get a deal done, a person making a will has no interest in obscurity: *RSPCA v Sharp* [2010] EWCA Civ 1474 @ [32].

18. Further, the court will lean against an interpretation of a will which renders a provision in it otiose; if there are possible rival meanings, it will prefer that which gives fullest effect to the will and avoids (or at least limits) redundancy: *PTNZ v AZ* [2020] EWHC 3114 (Ch) @ [45].

19. Unlike contracts, where evidence of a party's subjective intention is always inadmissible in relation to construction, the position is potentially different in relation to wills by reason of s.21 of the Administration of Justice Act 1982 (which mirrors s.19 of the Isle of Man Wills Act 1985). The statutory provision applies to a will insofar as it is meaningless, ambiguous on its face, or ambiguous in the light of otherwise admissible surrounding circumstances. If any of those conditions is satisfied, extrinsic evidence including evidence of the testator's intention, is admissible to assist in the interpretation of the will.

20. In this case Ms Reed and Mr Stewart Smith agree that, as regards clause 7 of the Will, the only possible gateway for the application of the statute is the third limb, namely, latent ambiguity arising in the light of the relevant factual matrix. The primary position of each is that clause 7 is not ambiguous but, rather, that its meaning is clear, so that the statute is not engaged. They thus invite me in the first instance to construe the Will without reference to any extrinsic evidence of Mrs Moores' intention and only to have regard thereto if I form the view that, contrary to their contentions (which, of course, lead to diametrically opposing results), the Will is ambiguous. I am content so to proceed.

21. If I decide that such extrinsic evidence is admissible, both Ms Reed and Mr Stewart Smith contend that the same supports their case, although both acknowledge that the limited material available is of but slender weight in the overall analysis. This is not a case where there is, for instance, a solicitors' note recording a clear discussion of the disputed issue with the testatrix. The will file has been destroyed. I refer to the extrinsic evidence below.

22. The exercise of a special power of appointment is a question of intention, to be deduced from the instrument in question. There must be a sufficient indication of the intention to exercise: *In re Ackerley* [1913] 1 Ch 510 @ 514-515; *In re Lawrence's Will Trusts* [1972]

Ch 418 @ 430. However, it is clear from the authorities that there is no need expressly to refer to the particular power or to the property subject to the power; the intention may be deduced from rather more general wording. In *In re Ackerley* the will read, "I give, devise, appoint and bequeath, all my estate, property and effects, whatsoever and wheresoever, both real and personal, which I have power to dispose of by my will, to my said husband"; this was held to amount to the execution of a special power of appointment. Likewise in *In Re Latta's Marriage Settlement Trusts* [1949] Ch 490 a will whereby the testator simply gave, devised and appointed all his property to his son was held to operate as a valid exercise of a power of appointment conferred by a marriage settlement. A similar result obtained in *In re Lawrence* where the will read, "I give devise and bequeath all my estate both real and personal whatsoever and wheresoever … or over which I shall then have power or appointment or disposition", wording not dissimilar to (and, by virtue of the absence of the verb "appoint", less strong than) that in clause 7 of Mrs Moores' Will.

23. I do not believe that it is seriously contested that, if the two DOAs had never been made (or if the 1997 DOA had at some stage been expressly revoked by another deed), the wording of clause 7 of the Will – which includes both the verb "appoint" and also the specific reference to property "over which [Mrs Moores had] any power of testamentary disposition whatsoever" – would have been insufficient to indicate an intention to appoint, and to effect an appointment, pursuant to the Settlement. To the extent that Ms Reed reserved her position in this respect, I have no hesitation in concluding that clause 7 would (in that scenario) have had that consequence, entailing an appointment in respect of the Patricia Trust Fund in respect of Christian, Rebecca and Matthew equally. I so determine based on the ordinary meaning of its language. As it is, that view is firmly supported by the cases referred to above, although I acknowledge that, as with any question of construction, each decision turns on the particular words in the particular will in its particular context such that the conclusion in any one case cannot constitute direct authority for an instrument in different terms: *In re Knight deceased* [1957] Ch 441, CA @ 453.

24. However, in this case the Will does not operate with a clean slate behind it as regards the Patricia Trust Fund. As it is, the power of appointment conferred by the Settlement had been exercised by the 1997 DOA, and that deed remained in full force and effect until Mrs Moores' death. This, says Ms Reed, makes all the difference to the outcome. For his part, Mr Stewart Smith says it is an irrelevance.

25. Counsel agree that in law it is necessary to revoke the 1997 DOA before the power of appointment under clause 2(c) of the Settlement can be exercised. They differ as to whether clause 7 of the Will effected such revocation. If it did not, the 1997 DOA stands and hence Christian and Rebecca share the Patricia Trust Fund to the exclusion of Matthew. If it did, the Patricia Trust Fund is shared jointly by all three siblings. I must decide whether clause 7 effected revocation of the 1997 DOA (and then made a new appointment) or whether it was of no effect as regards the 1997 DOA.

26. I was referred to four authorities said to express principles in relation to the revocation of powers of appointment. Necessarily, as with any case involving an issue of construction, each case turned on the wording of the particular instrument and its own facts but it is nevertheless instructive to consider the dicta in their respective context.

27. The first case is *Pomfret v Perring* (1854) 43 ER 1071. A 1799 settlement conferred, in the events which happened, a power of appointment on Mrs Perring. So too did the will of her father. In 1847 Mrs Perring executed a deed of appointment in respect of one-fifth of the property over which she had a power of appointment pursuant to her father's will. This appointment was expressed to be revocable by deed or will. By her will of 1852 Mrs Perring appointed all the real and personal estate of which at her death she was possessed of or entitled to or "under or by virtue of the powers contained in the said indenture of settlement or otherwise [she had] power to appoint".

28. The Master of the Rolls held that the testamentary appointment affected the funds already appointed. He concluded that Mrs Perring's will operated: (i) as an exercise the powers of appointment vested in her; (ii) to revoke the 1847 appointment; (iii) thus to pass all the property in question by her will. The two latter declarations were appealed. The dispute was as to whether the power of revocation had been exercised in relation to the 1847 appointment, with all that entailed.

29. The Court of Appeal in Chancery allowed the appeal. Knight Bruce LJ said:

> "I apprehend that it is not according to the true import or correct interpretation of the words used by the testatrix to say that, they exhibit of themselves an intention to

exercise a power of revocation. *But if the will shews an intention to have existed, which, without so construing them, cannot be effectuated, they may certainly be so construed.* I conceive, however, that will here does not shew such an intention. *Every word of the instrument may, in my opinion, be satisfied, without ascribing to the testatrix any idea of dealing with the power of revocation or the property subjected to it*."

(my emphasis)

30. Turner LJ said:

"The cases cited on behalf of the Respondents are very distinguishable from the present. Here an actual appointment has been made with a power of revocation, and that appointment was to be undone, before the power of new appointment would arise. To shew that a power of this description has been exercised, it is not, I think, enough to shew an intention to appoint; an intention to revoke the former appointment ought, I think, also to be shewn. The principles acted on in other cases, with respect to the exercise of powers, seem to me to apply to this. If a person has an interest in one subject, and a power over another, and uses general words of disposition only, those words will not operate as an exercise of the power. It is otherwise when he has no interest, but only a power. The same principle must, I think, apply to a case where a person has a power of appointment, and also a power of revocation and new appointment. The general words of appointment ought not to be held to be an exercise of the power of revocation. *If there was no power except one of revocation and new appointment, it would be different, and the general words would be then held to be an exercise of that power.* I think it clear that an intention must be shewn to revoke and undo what has been already done. I cannot find that intention here."

(Again, my emphasis)

31. The result, therefore, was that Mrs Perring's will operated to appoint only the previously unappointed four-fifths of the subject property; it did not revoke the earlier appointment.

32. I draw the following from *Pomfret v Perring*:

(1) The issue was taken to be one of the true construction of the will on its wording and in its context.

(2) An intention to revoke must be shown; it is insufficient merely to show an intention to appoint: see the underlined text.

(3) In the context of the case, no such intention was to be ascribed to the testatrix; Mrs Perring's will could fully operate without any power of revocation being exercised. This was because, absent revocation, the will could nonetheless effectively appoint the previously unappointed four-fifths of the property. The testatrix held two distinct 'live' powers: (i) the power to revoke; (ii) the power to appoint. The exercise of the latter was freestanding and not, as regards the four-fifths, dependent on any revocation. There was thus something to which, even without any revocation, the appointment provision in the will could attach, and something which it could achieve.

(4) However, (strictly *obiter*) if provisions in a will would be idle unless the will is taken to have exercised a power of revocation, the general words will be held to have that consequence in order to give them effect: see the italicised text.

33. Next in time is *In re Brace* [1891] 2 Ch 671. An 1866 deed gave rise to a power of appointment. The power was fully exercised in respect of certain real estate by a deed of 1870, on a revocable basis. By her 1886 will Kate Brace devised all the real estate to which she was entitled in favour of different parties from those in whose favour the 1870 deed had been made.

34. The issue was whether her will, by the general devise of real estate, operated as an exercise of the power of revocation and new appointment reserved by the 1870 deed. North J rejected the contention that it did, either pursuant to s.27 of the Wills Act 1838 or as a matter of construction of the will itself. He said @ 675/6:

> "Wherever there has been a complete appointment under a power, an appointment which entirely disposes of the property, you must get rid of that appointment in some way or another before any further appointment can be made. In other words, you must displace that which has operated as a complete appointment before there can be room for any further exercise of the original power, or, to put it in legal language, he must revoke the existing uses or trusts, and creates new ones to take their places. It is not of course necessary that this should be done by technical words. Though there are two things to be done – a revocation of the existing uses and a

> subsequent substitution of other uses – the two may be done *uno flatu*[1] just as well as by two separate processes. The revocation of the old uses and the declaration of new ones may be contained in different instruments, or they may be in one and the same instrument, *and, moreover, it is clear law as well as common sense that the thing may be done, without any express revocation of the old uses, by the use of words which can take effect only if a revocation of the old uses is implied.* If my power has been exercised in favour of A, and by his will the donee of the power were to say, "Although I have given the property to A, I now give it to B," that, of course, would imply the revocation of the gift to A, and the substitution for it of the gift to B. But, although the two processes may be combined in that way, you must be able to find that the first appointment, so far as it is effectual, is displaced by something which is afterwards done.
>
> In the present case I cannot find anything to displace the appointment in favour of the five children which is contained in the deed of the 29th of June, 1870. If that appointment is effectual, I cannot see anything to supersede it or to put something else in its place. If and so far as that appointment is ineffectual, the original power remains in force, and may be exercised, but, except so far as the appointment is ineffectual, I do not see what power now remains which can be effectually exercised by the will. … But her will can only exercise the power so far as there is not already any appointment in existence which exhausts the power, and, in as much as in the present case there is a valid existing appointment which has not been revoked, there is, in my opinion, no longer any power subsisting which can have any practical effect."

(My emphasis)

35. From *In re Brace* I extract:
    (1) Again, the case involved the interpretation of the particular will.
    (2) In line with *Pomfret v Perring* (considered in *In Re Brace* at 677), it is necessary to discern an intention to revoke a previous appointment if the purported later exercise of

[1] Literally, in one breath, i.e. simultaneously. The term describes a series of acts which comprise one overall transaction which are regarded as occurring at the same time.

a power of appointment is to be held to extend to the property so previously appointed: see the underlined words.

(3) Where (as in *In re Brace*) a power of appointment has been completely exercised, unless and until revocation thereof is effected, there is no subsisting power of appointment; exercise of the power of revocation will effectively revive the power of appointment.

(4) Although revocation must be found for any later appointment to have substance, revocation need not be effected by express words; it can be implied. Indeed, (again in line with *Pomfret v Perring*) it will be implied if the provisions of the instrument would be nugatory unless revocation were implied: see the italicised words.

(5) North J's conclusion that Mrs Brace's will did not revoke the earlier appointment was based on the fact that the general devise of real property by the will did not itself indicate an intention to revoke the earlier appointment in respect of the real estate.

36. In my judgment, the decision is unremarkable on its facts. Further, the terms of Kate Brace's will were materially distinguishable from the Will in this case since it appears that the only reference to property over which the testatrix "might have any disposing power" (p.672) was in relation to Mrs Brace's personal (not real) estate.

37. Ms Reed submitted that the example (involving A and B) given by North J of an effectual revocation by implication is far removed from that contended for by Mr Stewart Smith in this case. I agree that it is. However, I do not read North J as having given anything other than a mere illustration of his fundamental point that express revocation is unnecessary. I do not believe that the example is to be taken as suggesting that any other lesser form of words must, regardless of context, be insufficient to effect implied revocation. Not only did North J not so state but also it would not have been open to him to delimit the bounds of implied revocation in such a way. I reiterate that any case turns on its wording and facts.

38. The third case is *In re Thursby's Settlement* [1910] 2 Ch 181. A settlement conferred a power of appointment on a husband and wife. The appointment was exercised by them in respect of certain real estate (the Priors Hardwick Estate), the appointment being revocable. By a later deed they appointed the whole of the trust moneys, stocks, funds and securities in the settlement in favour of others, making no reference to the previous appointment.

39. Warrington J held that the second appointment revoked the first on the basis that the disposal thereby made was inconsistent with it. The Court of Appeal disagreed, deciding that the power of revocation had not been exercised.

40. Farwell LJ said:

> "The law as to powers of revocation and new appointment has been settled for more than 50 years by *Pomfret v Perring*. A power of revocation is not a power of appointment, but is a power the exercise of which is a condition precedent to the exercise of the power of appointment in question. An appointment, therefore, in exercise of a power of appointment and of every or any other power or similar words does not prima facie refer to powers of revocation, but two powers of appointment: if and so far therefore as the intention to appoint in such a case depends on the reference to the power, it cannot be found: such words might shew an intention to execute not only the power in the particular instrument stated, but also any other power of appointment which the appointor might possess, but it does not shew any intention to execute a power of revocation.
>
> It is, however, of course open to the claimants to shew that there are other indicia besides the reference to the power, shewing an intention to execute; *for example a reference to property which can only pass by means of an execution of both power of revocation and appointment;* thus, if in the present case the appointment had been of "the Priors Hardwick Estate", the powers both of revocation and appointment in the deed of 1895 would have been exercised because in no other way could the clear intention to pass the Priors Hardwick Estate be effected.
>
> The question therefore next arises, can words so inappropriate as "trust moneys stocks funds and securities" be held to include this real estate? The general rule is that *if there is property to which the words of appointment apply in their primary sense, so that effect can be given to the deed in its ordinary signification*, the appointment is confined to its primary meaning, and this is especially the case when the Court is after divesting an estate already vested."

(my emphasis)

41. Answering the question posed, the Court of Appeal unsurprisingly proceeded to conclude that the words used in the second appointment did not include the real estate. The words "stocks funds and securities "clearly" did not comprise real estate: p.187.

42. In my judgment, the decision in *In Re Thursby's Settlement* did not lay down any new principle. It was merely an illustration of the application of established principle (derived from *Pomfret v Perring*) to the facts of the case. The language of the second appointment fell far short of signalling an intention to revoke the first appointment in relation to the Priors Hardwick Estate.

43. However, it is of note that again the Court of Appeal, which again treated the issue as one of construction (p.185) endorsed the notion that, in an appropriate context, an intention to execute a power of revocation may be implied if a provision in the instrument would otherwise be idle: see the first set of italicised text.

44. Of course, that was not the case in *In Re Thursby's Settlement* because the second appointment was undoubtedly effective over the personal estate (the trust moneys, stocks, funds and securities) which constituted its subject-matter; effect could be given to the deed without implying any revocation of the earlier appointment, in line with the second set of italicised words. There was thus, contrary to the view of Warrington J (and effectively accepting the submissions of Mr Cave KC at p.185), no inconsistency between the two appointments, and no sterility of the second. *In Re Thursby's Settlement* was, like *Pomfret v Perring*, another "two power" case.

45. Again, I do not believe that the example given by Farwell LJ (in the second paragraph cited) of words that would, on the facts of that case, have connoted an intention to execute the power of revocation was any other than that – a mere example.

46. Finally there is *In re Barker's Settlement* [1920] 1 Ch 527. In 1881 Arabella Barker created a settlement which established a trust in her favour for life, with remainder over. Ms Barker was given a power of revocation and appointment, exercisable by deed or will, to revoke the trusts and to declare new trusts. This power was exercised by her twice, in 1906 and 1909, in her own favour, the deeds stipulating that the sums in question would be held for her absolutely discharged from the trusts of the settlement.

47. By the testatrix's 1914 will she gave devised and bequeathed certain personal items. She then proceeded to devise, bequeath and appoint all her residuary estate, real and personal. She had no other power of appointment other than that reserved by the settlement and her property, apart from the settled trust fund, was of little value.

48. Sargant J held that the words of the will were sufficient to work the double process of revocation and new appointment. He said:

> "*This is what is sometimes known as a one power case – that is a case where the testatrix had only one power of appointment*. And it is clear, and indeed is conceded, that the words of the will would be sufficient in such a case to exercise a general power of appointment even apart from s.27 of the Wills Act, or to exercise a special power of appointment: *In re Mayhew*. But it has been strongly contended that they are not sufficient to exercise a power the exercise whereof requires in strictness a double process – namely, first revocation and next new appointment. In my opinion, however, this is not so. The words here are made singularly emphatic by the repetition of the word "and" instead of its mere transposition; and the previous words of gift "I give devise and bequeath" are repeated in full, and then the words "and appoint" are added; the phraseology is almost as marked as if the added words had been "and I appoint". The language indicates clearly an intention to add to a gift of property belonging in full to the testatrix a gift of property over which she had a power of appointment. *And there being no property of this kind except property over which she had a power of revocation and new appointment* (a distinction fine in itself and hardly appreciable by a layman), *she must have been referring to this property and this power*. And this being established the words are sufficient to effectuate her double process of revocation and new appointment."

(my emphasis)

49. From *In re Barker's Settlement* I discern that:
    (1) The decision establishes no new principle, being decided on its own facts.
    (2) As before, there is recognition of the dual need both to revoke and appoint, if an appointment is to operate in respect of property which has been the subject of a previous appointment.

(3) Once again, but this time as part of the *ratio*, the fact that the words of the will would achieve nothing unless they applied to the subject settlement and operated, in a double process, to effect both revocation (of the earlier appointment) and fresh appointment was regarded as a matter of significance: see the italicised words.

50. Ms Reed submitted that *In Re Barker's Settlement* is distinguishable from this case. I accept that its facts are different. However, because (as I have emphasised) every case turns on its own wording and facts, I do not believe that the differences are of significance. I do not base my decision on similarities (or the lack thereof) between the facts of the four cases cited to me and those of this case.

51. However, I do consider that *In Re Barker's Settlement* is instructive insofar as it reflects and confirms a general trend, readily discernible from the authorities, against a conclusion which would leave aspects of a will redundant and shorn of consequence, having regard to both the language of the instrument and its context.

52. Not only did the words of the will in that case denote – through the use of the verb "appoint" – an intention to make an appointment, in a context where the only power of appointment vested in the testatrix was that derived from the settlement, but also unless the will were read as exercising such power (something which in the circumstances necessarily entailed revocation of the previously declared trusts) the will would have had almost no practical bite given the paucity of the testatrix's estate. In the circumstances, the court, construing the will in context, was understandably anxious to give it a purpose and to fulfil its object, in line with the general principle mentioned in paragraph 18 above.

53. I was also referred to *Lewin on Trusts*, 20th ed., para.33-100, which deals with intention to exercise powers of revocation. The text reads:

> "In common with other powers, a power of revocation is not exercised unless an intention to exercise it is apparent. A power of revocation is not a power of appointment but is a power the exercise of which is a condition precedent to the exercise anew of a power of appointment. Hence an appointment in general terms in exercise of a particular power and of every other available power will not, *without more*, revoke an earlier exercise; and if a will is executed exercising a power of appointment and later a

deed is executed revocably exercising it in a different way, the deed is not revoked when the will takes effect. *But it is not necessary that there should be any express reference to the power of revocation and a grant of the specific property subject to the power will be enough. A gift in a will of property of a general description will be an exercise of the power only if the testator has no property of his own of that description, so that the gift has to be treated as an exercise of the power to take effect at all.* A release of the power of appointment will operate as a revocation, at any rate if the release is expressed to free the property subject to the power from the power altogether."

(My emphasis)

54. Counsel agreed the text to be an accurate summary of the law, although Mr Stewart Smith submitted that it is not a complete statement, lacking as it does any reference to *In Re Barker's Settlement.* He contended that it should record a further proposition along the lines, "An appointment which would be wholly ineffective in the absence of implied revocation must be deemed to effect implied revocation."

55. Unsurprisingly, the thrust of Lewin is line with what I have deduced from the authorities, namely:
    (1) An intention to exercise a power of revocation must be apparent from the instrument.
    (2) A power of revocation is distinct from a power of appointment.
    (3) Thus the mere exercise of a power of appointment will not "without more" operate as a revocation.
    (4) However, a power of revocation may be exercised otherwise than in express terms.
    (5) Moreover, if a testamentary gift framed in general terms will fail altogether unless it is construed as entailing the exercise of a power of revocation (so as to bring within the ambit of the will the property which is the subject of such power), the instrument will be taken as an exercise of the power: see the italicised text.

56. I consider that the last point reflects the points in paragraphs 32(4), 35(4), 43 & 49(3) above.

57. For my part, I do not share Mr Stewart Smith's concern that the statement of law in Lewin is incomplete. This is not because I dissent from the essential gist of his contended proposition. Rather, it is because I believe that the italicised text essentially covers the

situation, at least if for this purpose the making of gift is regarded as including not only a bequest or devise but also the exercise of a power of appointment held by the testator.

58. Having ascertained the guiding principles, I turn to their application in the instant case.

59. I remind myself that the words of the Will do not stand in isolation. As Lord Hoffmann said in *Kirin-Amgen Inc v Hoescht Marion Roussel Limited* [2004] UKHL 46 @ [64]:

> "No one has ever made an acontextual statement. There is always some context to any utterance, however meagre."

60. To the same effect, roughly a decade earlier, in *Arbuthnott v Fagan* [1995] CLC 1396, CA Sir Thomas Bingham MR had said:

> "Courts will never construe words in a vacuum. To a greater or lesser extent, depending on the subject matter, they will wish to be informed of what may variously be described as the context, the background, the factual matrix or the mischief. To seek to construe any instrument in ignorance or disregard of the circumstances which gave rise to it or the situation in which it is expected to take effect is in my view pedantic, sterile and productive of error."

61. In this case there was no dispute, and I agree, that the relevant, admissible context of the Will includes the following:
    (1) When she made her Will Mrs Moores was well aware of the existence of the Settlement and of her powers of revocation and appointment. She had, after all, exercised the powers on two previous occasions. Further, she had signed off the Patricia Trust Fund accounts in the years immediately prior to the execution of her Will, an annual practice she continued after she made the Will. Each set of accounts includes text referring to the Settlement, the powers conferred by clause 2(c) of it, and the two DOAs (it being agreed that the "1999" is a typographical error which should read "1997").
    (2) As Mr Callin (the second Claimant and a trustee of the Settlement) confirmed in paragraph 51 of his witness statement, Mrs Moores had no other power of appointment vested in her under other trusts; her sole power of appointment was that conferred by clause 2(c) of the Settlement.

62. I consider this context to be significant when interpreting clause 7 of the Will. It is significant because:
    (1) As I concluded in paragraph 23 above, an intention to exercise a power of appointment is evident from the relevant wording in the Will (that part which refers to the appointment of property over which Mrs Moores had any power of testamentary disposition, shown in bold font in paragraph 3 above).
    (2) In the circumstances (and against the above background), a fresh and effective appointment cannot be achieved in any way or to any degree without the associated revocation of the 1997 DOA.
    (3) Thus, if one adopts Christian's construction of the Will, the relevant text of clause 7 is idle surplusage; it is redundant.

63. Ms Reed submitted that the relevant text in clause 7 is boilerplate and is no more than a general residuary gift included to cover all bases, to sweep up anything not already and otherwise disposed of, and to avoid any possible intestacy. She submitted that its catch-all nature has no further consequence. She argued that if, for example, the testatrix does not own any real estate, a provision such as clause 7 cannot entitle the court somehow to invest her with some land in order to give effect to that limb of the clause which refers to real estate. The position, she said, is likewise in this case vis-à-vis property over which Mrs Moores had a power of testamentary disposition. Ms Reed also contended that (absent revocation of the 1997 DOA) Mrs Moores had no property over which she could make any effective appointment. Her case was that a standard form, generic provision (such as clause 7, which makes no direct or specific reference to the Settlement or the DOA) may not always have, and does not here have, any practical application. She submitted that all in all in the circumstances clause 7 (which also makes no express reference to revocation) displays no evidence of any intention to revoke the 1997 DOA.

64. Despite the attractive way in which they were presented, I do not accept these submissions. I consider that:
    (1) The court should properly approach the Will on the basis that, so far as possible, every part thereof is to have meaningful effect and not be a waste of ink. This accords with the principle noted in paragraph 18 above.

(2) The example put forward by Ms Reed presents a very different scenario from that in this case. A situation in which a testatrix owns no real estate at all is far removed from one where, as here, the testatrix has a power of appointment, even if, strictly speaking, in order to exercise that power, revocation of an earlier appointment must first be effected.

(3) In Ms Reed's postulated scenario the gift of real estate expressed in the will irredeemably lacks any possible subject-matter. No form of words, or any interpretation thereof, can possibly give rise to anything to which the same can attach. It is simply impossible to identify any qualifying real estate, for there is none.

(4) By contrast, in the second scenario it lies readily within the testatrix's power to engage the power of appointment provided always that she invokes her power of revocation. Such revocation can, on the authorities, be achieved expressly or by implication.

(5) Ms Reed's example would be more apt and analogous if Mrs Moores had no potentially exercisable power of appointment, whether because she never held any such power or because, having had such power, she previously exhausted it irreversibly (by a complete and irrevocable exercise thereof). In that event, the relevant text of clause 7 of the Will would indeed be nugatory. But that is not this case.

(6) In the context of this case, having regard to the approach to construction that exhorts one to validate where possible and so to prevent drafting being in vain, it is natural and appropriate to read the words of clause 7 as impliedly bringing about the revocation of the 1997 DOA, for (at the date of Mrs Moores' death) revocation was all that stood in the way of the relevant text having substantive effect and without it the text was worthless.

65. Ms Reed also asked rhetorically why, if revocation had been intended, clause 7 had not so stipulated in express terms, especially given that the Will was drafted by Mr Moore who was fully familiar with the background. She said it could easily have done so. I accept that. But the question, posed for its forensic effect, ignores the fact that in almost any case of disputed construction it will be possible after the event to contend that the matter could have been otherwise expressed to avoid any doubt. That, though, is not particularly helpful when it comes to resolving the central question: what is the true interpretation of the instrument as drafted? See e.g. Lewison, *The Interpretation of Contracts*, 7th ed., para.2.113 and the cases cited therein. And as Mr Stewart Smith said, with hindsight one might equally ask why the Will was not drafted to include an express statement that

revocation of the 1997 DOA was not intended (if that was what those meant to achieve). All in all, I do not believe that the argument drives the conclusion for which Ms Reed contends.

66. I regard the revocation of the 1997 DOA, coupled with the making of fresh appointment in favour of all three children equally, as having been Mrs Moores' testamentary intention, as objectively deduced from the language of her Will interpreted in its particular context. As noted, Mrs Moores had but one power of appointment, that derived from the Settlement. She never held any other like power. There was therefore no other candidate to come within the scope of that which is clearly described by, and the subject of, the relevant text in clause 7. If Mrs Moores is not to be taken as having revoked the 1997 DOA, central parts of clause 7 of her Will were of no consequence at all.

67. In summary my reasoning is that:

(1) Since Mrs Moores only ever had a single power of appointment, that conferred by clause 2(c) of the Settlement, the reference in clause 7 of her Will to property "over which [she had] any power of testamentary disposition", although framed in general terms, is on the facts of the case close to an express reference to the power derived from the Settlement.

(2) Allied to that, if no prior appointment had been made by the DOA, the general words of appointment in clause 7 of the Will would undoubtedly operate as the exercise of the special power of appointment conferred by clause 2(c) of the Settlement, despite the absence of any specific reference to such power.

(3) Although clause 7 of the Will does not in terms allude to the Settlement or the DOA and does not expressly speak of revocation of the 1997 DOA, nonetheless in context the words of appointment (which, as above, can only apply to the power in that regard derived from the Settlement) are on their true construction properly to be regarded as effecting implied revocation of the 1997 DOA, for otherwise the words of appointment in clause 7 are otiose; unless clause 7 is construed as displacing what has gone before, both the verb "appoint" and also the phrase "over which I shall have any power of testamentary disposition whatsoever" come to naught, even though there was only one candidate to which the same can possibly refer (namely, the power conferred by the Settlement).

(4) In context, where there was no other power of appointment available to Mrs Moores, the notion that clause 7 did not refer, or operate in relation, to the power of appointment stemming from the Settlement on the footing that, absent express revocation, there was no

such subsisting power is, to my mind, commercially unrealistic. Whilst the concept that a previously used power of appointment lacks subject-matter unless and until the previous exercise is revoked is intelligible and indeed is articulated in *In Re Brace*, the concept is technical and more theoretical than real, and something of a play on words; to all practical intents and purposes Mrs Moores did retain the power to make an appointment under the Settlement by her Will notwithstanding that in order to exercise it anew she would have to revoke its prior exercise. It is not an abuse of language to say that a power to appoint remained vested in her, given that she could reverse that which had gone before at a stroke, including by implied revocation as part of a "double process" in what is here a "one power" case. Further, I do not believe that the said concept requires the court to construe clause 7 of the Will as impotent so far as the clearly intended exercise of the only power of appointment vested in Mrs Moores is concerned. It is permissible to regard the language as signifying an implied intention to revoke the 1997 DOA in order to render effective the intended fresh appointment in clause 7, else that object cannot be achieved and is frustrated.

(5) In the particular circumstances an intention to exercise the power of revocation is reasonably and objectively to be deduced from the terms of clause 7 of the Will, construed in their context. I conclude that the requisite intention is shown, not least because otherwise a significant element of the clause would be a waste of ink.

68. In my judgment, the present case is distinguishable on its facts from *Pomfret v Perring*, *In re Brace* and *In re Thursby's Settlement*. In those cases the intended appointment did have some application without the associated revocation of any previous appointment. They were so-called "two power cases", where the powers of (a) appointment and (b) revocation were both live. A valid appointment in respect of the previously unappointed property could be made despite non-revocation of the earlier appointment in respect of part of the property.

69. By contrast, the instant case is a "one power case"; the only power of appointment available to the testatrix, namely, that afforded by clause 2(c) of the Settlement is (without more) entirely exhausted by reason of the 1997 DOA and, as such, can come into play only, if at all, only together with the exercise of an associated power of revocation. Hence any subsequent purported appointment is wholly ineffective unless coupled with such revocation. It is this important factor – not present in e.g. *Pomfret v Perring* – which bears heavily on the interpretation of clause 7 of Mrs Moores' Will, which (as Sir Thomas

Bingham MR said) is to be read not in a vacuum but in context. Indeed, this case presents, in my judgment, a neat illustration of the very scenario contemplated by the dicta in e.g. *Pomfret v Perring*, which recognise that, if an expressed appointment would otherwise fail altogether unless revocation of a prior appointment is effected, this points to an interpretation of the instrument as working an implied revocation. That is, I believe, the effect of clause 7 of the Will, construed in its context.

70. For the above reasons I conclude that on the true construction of the Will, read in the light of the relevant factual matrix, clause 7 operates, both impliedly to revoke the 1997 DOA and also to exercise afresh the power of appointment conferred on Mrs Moores by the Settlement in favour of her three children equally.

71. As indicated in paragraph 20 above, I have reached the above conclusion without consideration of extrinsic evidence of Mrs Moores' intention under s.19 of the 1985 Act. Having done so, I must now consider whether the statutory gateway is open for me to admit such evidence in assisting the interpretation of the Will. As foreshadowed, such evidence is admissible only if the Will is ambiguous. As mentioned, both counsel's primary case is that it is not, and neither puts extrinsic evidence at the forefront of their case. However, if such evidence is admissible, each contends that it supports their case.

72. Although I have reached the conclusion set out above, I consider that it can be said that the Will is ambiguous. There is, it can be said, a tension between the literal reading propounded by Christian and the purposive, contextual meaning advocated by Matthew. Moreover, as I have explained, the meaning and effect of the Will is heavily influenced and coloured by the factual matrix, in particular (a) the fact that the sole power of appointment held by Mrs Moores was that conferred by the Settlement and (b) the very existence of the prior DOA (absent which, as indicated in paragraph 23 above, I do not believe that the interpretation and operation of the Will would be open to any serious argument), all of which context bears on and informs the reading of the Will, both giving rise to the competing meanings advocated by the parties and ultimately providing the answer thereto.

73. I therefore consider that I should have regard to extrinsic evidence including evidence of Mrs Moores' intention to see if it sheds light on matters and assists in resolving any ambiguity. However I reiterate that neither party contended that the limited material before

the court is particularly cogent or compelling, and I agree with that; there is, as Ms Reed put it, no golden piece of evidence.

74. Ms Reed drew my attention to the annual trust accounts and the fact that, although they were signed off by Mrs Moores, none of those post-dating the Will refers to the Will and to any consequence thereof vis-à-vis the earlier DOA; the statements in the accounts regarding the DOA remained unchanged from before the time that the Will was executed and did not allude to any intended revocation of the 1997 DOA. I do not consider that this is a point of substance. A will is an essentially private matter, taking effect only on death, and one would not expect it to feature in trust accounts produced during the life of the testatrix. Also, whereas the 1997 DOA had immediately revoked the 1981 DOA, the Will could not and would not have that effect on the 1997 DOA until the death of Mrs Moores, at any time before which the Will could itself be revoked; at the time of the accounts the Will had only a potential future bearing. Indeed, the position stated in the trust accounts can be said to have been accurate at the date thereof, even if potentially liable to revision on the death of Mrs Moores (if she did not change her Will in the meantime).

75. In his written evidence Christian alluded to Matthew's divorce and also to an alleged general cooling in the relationship between Matthew and their mother. Matthew disputed the suggestion of a cooled relationship. I attach no weight to Christian's assertion insofar as it was put forward to support the notion that Mrs Moores intended in her Will to exclude Matthew from sharing in the Patricia Trust Fund. The divorce itself was then a distant memory. Matthew's ex-wife had remarried a wealthy man in 1999 and had never sought to re-open the financial arrangements concluded between the couple. Further, as noted above and appears from clause 7 of the Will, Mrs Moores was quite content to leave by her 2007 Will one-third of her valuable estate (ignoring the Patricia Trust Fund) to Matthew, echoing the position under the 1993 will, which points against any notion of a cooled relationship.

76. I was also referred to what was said by Christian to be Mr Moore's firm and repeated insistence over the years to Mrs Moores that Matthew should never be reinstated as a beneficiary of the Settlement. Again, I regard this as of no consequence. Evidence could have been adduced from Mr Moore; it was not. Absent that, it is a mystery why it was allegedly regarded as critical to exclude Matthew from benefitting under the Settlement but

not from Mrs Moores' valuable estate at large: see paragraph 10 above. It is also perplexing that, even if (as Christian maintains) Matthew's divorce and the feared claims of his ex-wife accounted for the 1997 DOA, why, on the very same day as that DOA, Mrs Moores executed a codicil to her 1993 will leaving Matthew £700,000. That rather indicates that Mrs Moores did not embrace the notion of leaving Matthew out in the cold (as well as again running contrary to the notion of a cooled relationship). Further, I have seen nothing to show that, even if (for whatever reason) advice of the nature claimed was consistently given to her by Mr Moore (which would beg the question: why the need for repetition), Mrs Moores accepted it. It is, after all, her intention, not that of Mr Moore, which is germane.

77. On behalf of Matthew reliance was placed on the fact that in letters of instruction to Mr Moore shortly before the Will (dated 19 September 2007 and 28 September 2007) his mother twice stated, "I wish in my Will all my worldwide assets to be taken into account and divided equally between my three children". That statement is in line with clause 7 of Will and although it is plainly not determinative of itself it is certainly consistent with the notion that Mrs Moores intended that Matthew receive a third of everything that lay within her gift, including that over which (per clause 7) she had a power of disposition, i.e. the Patricia Trust Fund. It tallies with an intention to revoke the 1997 DOA and exercise the power of appointment conferred by the Settlement in favour of all three children equally.

78. Accordingly, I conclude that insofar as the rather sparse extrinsic evidence of the testatrix's intention sheds any light on the interpretation of the Will, for what it is worth it supports rather than undermines the conclusion which I reached independently of such evidence.

79. Consequently, I determine that clause 7 of the Will amounts to the effective exercise of the power of appointment given to Mrs Moores by clause 2(c) of the Settlement, effecting an implied revocation of the 1997 DOA in the process. In my judgment, the contrary conclusion (i.e. that clause did not effect both a revocation and a fresh appointment but only purportedly effected a new appointment, without a revocation, such that it in fact had no effect at all as an appointment) involves an overly literal, non-purposive, reading of the Will which fails to give sufficient weight to the context in which the Will was executed and in which it operates.

80. I shall thus declare that the effect of the appointment pursuant to the Settlement made by clause 7 of the Will is that Christian, Rebecca and Matthew are each beneficiaries under the Settlement in equal shares.

81. Since circulation of this judgment in draft the parties have provided an agreed draft order. With minor amendments, I approve that order.