Neutral Citation Number: [2023] EWHC 642 (Ch)

Case No: PT-2022-000196

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST (Ch)

IN THE ESTATE OF JAMES MURRAY MCKAY DECEASED

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 22 March 2023

Before :

DEPUTY MASTER TEVERSON

- -

Between :

STEVEN LESLIE PEAD — **Claimant**

- and -

Defendants

(1) PROSTATE CANCER UK
(2) MACMILLAN CANCER SUPPORT
(3) CANCER RESEARCH UK
(4) SALLY PEAD
(5) LEAH GRACE JONES (a child) (by her litigation friend RICKY JONES)
(6) JOSHUA PEAD
(7) THE ESTATE OF LISA JONES DECEASED (represented by ADAM PEAD)
(8) ADAM PEAD

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Timothy Clarke (instructed by **Cognitive Law Limited solicitors**) for the **Claimant**
Sam Chandler (instructed by **Withers LLP solicitors**) for the **First to Third Defendant**

Hearing date 18 January 2023

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Approved Judgment

This Judgment was handed down remotely at 10.30am on 22 March 2023 by circulation to the parties or their representatives by email and by release to the National Archive

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DEPUTY MASTER TEVERSON

DEPUTY MASTER TEVERSON :

1. This claim concerns the last will and testament dated 3 August 2016 ("the will") of James Murray McKay ("the deceased") who died on 11 February 2021. The primary relief sought by the Claimant is an order for the rectification of the will pursuant to section 20 of the Administration of Justice Act 1982. The Claimant also asks the court to interpret clause 11 of the will and direct how the deceased's residuary estate is to be divided.

2. The Claimant, Steven Pead, is the stepson of the deceased. His mother Dorothy was married to the deceased but predeceased him in March 2015. The deceased had been previously married. The deceased had three children Andrew, Murray and Lydia McKay by his first marriage.

3. By clause 1 of the will the deceased appointed Steven to be his executor and trustee. By clause 4 the deceased made gifts of money that were set out in clauses 4.1 to 4.8. By clause 4.1 he gave £50,000 each free of all taxes to his stepson Steven Pead and his wife Sally Pead, the Fourth Defendant. By clause 4.2 he gave £10,000 to his step great granddaughter, Leah Grace Jones, the Fifth Defendant. By clause 4.3 he gave £20,000 each to his step grandson Adam Pead, the Eighth Defendant, his step granddaughter Lisa Jones, whose estate is the Seventh Defendant and his step grandson Joshua Pead, referred to in the will as Josh Pead, the Sixth Defendant, and the person ordered by Master Kaye on 17 October 2022 to represent the estate of Lisa Jones. For convenience, I shall refer to those pecuniary legatees together as "the family members".

4. By clause 4.4 the deceased gave £2,000 to Macmillan Cancer Support for the benefit of Macmillan Nurses at Kingston Hospital, London. By clause 4.5 he gave £2,000 to Macmillan Cancer Support for the benefit of Macmillan Nurses at Worthing Hospital, West Sussex. By clause 4.6 he gave £6,000 to MacMillan Cancer Support for the benefit of Macmillan Nurses' work generally. By clause 4.7 he gave £5,000 to Cancer Research UK. By clause 4.8 he gave £12,000 to Prostate Cancer UK. I shall refer to those legatees together as "the charities".

5. By clauses 5, 6 and 7, the deceased made specific gifts of chattels and jewellery to his children Andrew, Murray and Lydia McKay respectively.

6. By clause 8 the deceased made a specific gift of his property 26 Sea Lane Gardens, Ferring, Worthing or such other property as was his principal place of residence at the date of his death. By clause 8.1 he gave a 25% share to Steven Pead. By clause 8.2, he gave a 25% share to his stepson

Keith Pead. By clause 8.3, the remaining 50% share was to accrue and be added to his Residuary Estate under clause 10 of his will.

7. By clause 10 the deceased directed his trustees to hold the residue of his estate to pay any debts funeral and testamentary expenses, to satisfy all gifts of specified property referred to in his will, to pay all gifts of money referred to in his will and to deal with the remainder as directed.

8. Clause 11 is headed **Gifts of Residue**. It reads:-

"Subject as above my Trustees shall hold my Residuary Estate upon trust for such of the beneficiaries named in Clauses 4.1 to 4.8 inclusive absolutely as shall survive me and in accordance with the provisions relating to each gift."

9. The Claimant asks the court to rectify clause 11 of the will so as to refer to clauses 4.1 to 4.3 inclusive instead of to clauses 4.1 to 4.8 inclusive. It is the Claimant's case that the deceased only intended the family members referred to in clauses 4.1 to 4.3 inclusive to share in the residue of his estate and not the charities named in clauses 4.4 to 4.8 inclusive.

10. The claimant also asks the court to determine what is meant by the words *"in accordance with the provisions relating to each gift"* at the end of clause 11 and to determine whether the residuary estate should be divided pro rata or equally between the residuary beneficiaries and if equally whether by sub-clause or by named beneficiary.

11. At the time he made the will the deceased was a widower aged 79. He had three children from his first marriage two of whom he had not seen for around 20 years. He had two stepsons - the Claimant Steven Pead who was married with three children and a granddaughter and Keith Pead who did not have children.

12. The deceased lived at 26 Sea Lane Gardens, Ferring, West Sussex BN12 5EQ. In 2016 he gave the approximate value of the house as £360,000 on the will questionnaire of Burnand Brazier Malcolm Wilson the trading name of BBMW Limited ("BBMW") to whom the deceased went in July 2016 to make a will. In addition the deceased had not insubstantial savings and investments. The net value of his estate was sworn for probate on 9 September 2021 as amounting to £964,845.31.

13. The Claimant says his stepfather was a simple and straightforward person. He says he believes it is likely the deceased instructed BBMW simply because they were close to where he would collect his newspaper from every week.

14. The deceased's initial instructions were taken by Mrs J.M.Sartin who was at the time a director in the firm of BBMW at BBMW's offices at Goring-by-Sea, West Sussex on 13 July 2016. Mrs Sartin says in paragraph 3 of her witness statement that on that occasion the deceased handed her a partially completed Will questionnaire the blank of which had been forwarded to him by the firm. She says the deceased also handed her two typed documents entitled "Will James Murray McKay" which were in a similar but not identical form. She says the deceased also handed her a handwritten document marked "To whom it may concern" explaining why it was his intention to exclude his children from his will.

15. The typed documents marked "Will of James Murray McKay" record that Steven Pead should be the executor; that on the sale of the deceased's property 26 Sea Lane Gardens, 50% was to be divided equally between Steven Pead and Keith Pead and that 50% was to be divided equally between the deceased's three children Andrew, Murray and Lydia McKay. There were to be pecuniary legacies of £10,000 to be put in trust for Leah Grace Jones until she reached 18, £1,000 for the Macmillan nurses at Kingston Hospital, Surrey, £1,000 for the Macmillan nurses at Worthing Hospital Sussex; £5,000 to be given to the Macmillan nurses UK; £5,000 to be given to Cancer Research UK; £10,000 to be given to Prostate Cancer UK; £20,000 to Adam Pead; £20,000 to Lisa Jones, and £20,000 to Josh Pead. There were to be gifts of chattels to Andrew, Murray and Lydia.

16. Mrs Sartin says in paragraph 4 of her witness statement that at the meeting on 13 July 2016 she made handwritten notes on one of the typed documents while taking the deceased's instructions. She says that she was instructed by the deceased on this visit that he intended to exclude his children Andrew, Murray and Lydia and leave 75% of his residue to his stepson Steven Pead and 25% to his stepson Keith Pead after payment of the pecuniary gifts. A copy of the typed document on which Mrs Sartin made her handwritten notes is before me at page 324 of the bundle. The notes record the deceased as saying he had had no contact whatsoever with his children for 20 years.

17. On 13 July 2016 Mrs Sartin wrote to the deceased thanking him for coming into the office to see her. She enclosed a draft of his new will together with a Commentary Sheet detailing the main provisions. The draft will contains money bequests in clauses 4.1 to 4.3 to the family members and in clauses 4.4 to 4.8 to the charities. It contains specific gifts of chattels to Andrew, Murray and Lydia in clauses 5, 6 and 7. Clause 10 directs that the residuary estate is to be held as to a 75% share for Steven Pead and as to a 25% share for Keith Pead. Clause 10.3 provided that if under clause 10 any share failed, such share should return to his residuary estate and be distributed to

the other beneficiaries pro rata according to their shares. In Clause 11 the deceased declared he had not made any substantive provision in the will for his children as they had been estranged from him for some twenty years. Mrs Sartin states in paragraph 5 of her witness statement that the draft will was only ever intended to be an initial draft and that the words “for checking” were clearly marked on every page of this draft will.

18. On 15 July 2016 the deceased called into the offices of BBMW. An attendance note records that he had received the draft will but *“thinks that the amounts are not quite correct”*. The attendance note records the deceased asked for and was provided with a copy of the notes he had left with Mrs Sartin. He was not on that occasion seen by Mrs Sartin.

19. The deceased attended the offices of BBMW again on 27 July 2016 by prior appointment. Mrs Sartin was not available. The deceased was seen instead by Alison Hill who was at that time a director of BBMW. Prior to this appointment the deceased had annotated the draft will sent to him by Mrs Sartin recording a number of amendments he wanted to be made to it. He wrote in the margin to clause 4 increases to be made to the gifts to the charities. In clause 5 he wrote the comments he wished to be included alongside the gifts to each of his children. In clause 10.1 he wrote 25% against Steven Pead’s 75% share of residue. He did not however annotate how the remaining 50% was to be divided.

20. Mrs Hill says in paragraph 3 of her witness statement dated 7 December 2022 that at her meeting with the deceased on 27 July 2016 she went through each clause of the draft will and that the deceased gave her detailed oral instructions as to the disposition of his estate. Mrs Hill refers in paragraph 3 of her statement to then making *“written notes of all his instructions on the draft will*”. She says she then made *“handwritten notes on the draft Will noting changes which Mr McKay wished to be made to the draft”*. This paragraph appears to refer to two sets of notes but Mrs Hill in cross-examination said there were no separate handwritten notes. The handwritten notes of Mrs Hill on the draft will record the increases in the legacies to the charities and the comments the deceased wanted to be made alongside the gifts to his children. Mrs Hill says in paragraph 3 of her witness statement that the main change to be made related to clause 10 sub-headed “Gifts of Residue”. She says that at the bottom of that page she made a note in her own handwriting as follows;-

‘House 25% to Steven +25% Keith of sale proceeds

+50% to residue’.

Mrs Hill says in paragraph 3 she then made a handwritten note at the top of paragraph 10 adjacent to the sub-heading as follows:-

'÷ between all those mentioned in clauses 4.1-4.8'."

21. Mrs Hill says in paragraph 4 of her witness statement that following her meeting with the deceased on 27 July 2016 she made up a file attendance note detailing the instructions which the deceased had given to her at that meeting.

22. Ms Hill's typed attendance note records the increases to the legacies to the charities and the words the deceased wanted to be inserted alongside the gifts to his children. It then records the deceased's instructions relating to the sale proceeds of the house and the division of the residue changes as follows:-

"He would like the sale proceeds of the house to be divided as to 25% to Stephen Peed, 25% to Keith Peed with a final 50% going to Residue. The Residue is to be divided between those people mention in clauses 4.1 to 4.8 in equal shares."

23. Following the deceased's meeting with Mrs Hill on 27 July 2016 a further draft will was prepared. It is not clear who prepared the further draft of the will. In reply to a letter dated 30 September 2022 from Cognitive Law raising this issue BBMW stated they were not able accurately to answer that question. They stated that Mrs Hill saw the deceased on 27 July 2016 and it was her practice to pass instructions on to her assistant Olivia Smith for her to prepare the revised draft for execution. Commenting on the same letter, Mrs Sartin said that her notes were utilised to prepare the draft on the first occasion and Mrs Hill's attendance note and written amendments were utilised for the second draft. Mrs Sartin says that the second draft will prepared from Mrs Hill's notes was in the precise terms of the engrossed will of 3 August 2016.

24. In paragraph 8 of her witness statement Mrs Sartin says that on 29 July 2016 she *"considered the details of Alison Hill's attendance note and the notes made by her on the draft will"*. She says she then wrote to the deceased a further letter dated 29 July 2016 as *"she considered there were one or two further points that might be considered by him"*. The points were set out in the second and third paragraphs of the letter. They related to clauses 8, 8.1, 8.2 and 8.3. These clauses contained the gifts of a 25% share to Steven and to Keith of the deceased's property 26 Sea Lane. The letter enclosed a further draft of the will.

25. Mrs Sartin says in paragraph 9 of her witness statement that a revised will was then engrossed amending the original draft and a meeting was arranged with the deceased to attend at the Goring office of BBMW on 3 August 2016. Mrs Sartin says that although the meeting was arranged with Alison Hill, in the end she (Mrs Sartin) met with the deceased as Alison Hill was unavailable. Mrs Sartin says she handed the deceased the engrossed will to read in the reception area. She says that once he had done so she arranged to meet the deceased in the interview room adjacent to the reception area. She says she went through the amended will with the deceased who told her that he had not received her letter of 29th July. She says she then went through her letter with him explaining the basis of her questions. She says she suggested having the will further amended but that the deceased was happy to execute the will on that day. She says she told the deceased that if he wished to make any further changes, he could always execute a replacement will at a later stage.

26. Mrs Sartin says in paragraph 9 of her witness statement that it was her understanding *"from instructions and from Alison Hill's attendance note [of] 27 July 2016 that the Testator intended the residuary estate to be divided equally between the beneficiaries named in clauses 4.1 to 4.8, that is to say to be divided equally between them"*. Mrs Sartin says she also made a short attendance note of her meeting with the deceased, when he executed the will.

27. Mrs Sartin's attendance note reads:

"I went through the letter with him explaining the basis of my questions and suggesting that he signed the present will as a holding Will and that he went through my letter when it arrived with him and would let us know whether or not he wanted to make the relevant amendments.

He agreed."

28. Mrs Sartin's short attendance note of 3 August 2016 does not record that she went through the will with the deceased. It records that the deceased confirmed that he had not received her letter of 29 July 2016 enclosing the further draft will. It follows that the first time the deceased saw the will in the form executed by him later that day was when he attended the offices of BBMW on 3 August 2016. The attendance note records that Mrs Sartin went through the letter explaining the basis of her questions and records that she suggested to the deceased that he sign the *"present will as a holding will"*.

29. The will was executed by the deceased on 3 August 2016 at the offices of BBMW in the presence of two members of BBMW's staff. On the same day Mrs Sartin wrote to the deceased confirming that she had kept a copy for the file, indexed the original in their safe and enclosing a copy for his records. She enclosed her firm's account for settlement in the sum of £186 inclusive of VAT. The deceased attended the offices of BBMW on 5th August 2016 and discharged the fees by way of a cheque.

30. The will as executed includes the increased legacies to the charities save that it fails to record the deceased's instruction to increase from £5,000 to £6,000 the legacy under clause 4.7 to Cancer Research UK. It is accepted by BBMW that Cancer Research UK should have received a gift of £6,000. Under clauses 5, 6 and 7 the will records the comments the deceased wanted to appear alongside the gifts to his children. The will contains a new clause 8 disposing of shares in the deceased's property 26 Sea Lane. By clause 8.1 a 25% share of the deceased's property is given to Steven Pead with a provision for substitution of issue. By clause 8.2, a 25% share is given to Keith Pead who was recorded by Mrs Sartin on 13 July 2016 as having no children. By clause 8.3, the remaining 50% share is directed to accrue to and be added to the residuary Estate under Clause 10 of the will. Clause 10 contains administrative trusts. The disposition of residue is contained in clause 11 which provides:-

> *"Subject as above my Trustees shall hold my Residuary Estate upon trust for such of the beneficiaries named in Clauses 4.1 to 4.8 inclusive absolutely as shall survive me and in accordance with the provisions relating to each gift".*

31. The deceased died on 11 February 2021 leaving the will executed by him on 3 August 2016 as his last will. Probate of the will was granted to the Claimant out of the Principal Registry of the Family Division on 9th September 2021. The net value of the estate was certified as amounting to £964,845.31. The deceased's property was valued for probate at £495,000.

32. The claim as now before me had, as Mr Chandler puts it in his skeleton argument, an inauspicious start. A Probate Claim form was issued on 8 March 2022 naming BBMW as the Defendant. It stated that the legal basis for the claim was rectification. It asserted that the Defendant solicitors were negligent in that the Will, as executed, did not give effect to the deceased's intentions. It did not name any of the charities or other beneficiaries as Defendants.

33. The claim was accompanied by a witness statement of the Claimant dated 7 March 2022 apparently prepared in support of a Part 8 claim that was

never issued. The Claimant stated in paragraph 22 of his witness statement that he did not believe that after making "very specific bequests" to the named charities, he then wanted them included in the equal shares of residue. The Claimant in paragraphs 21 and 22 speculated on what his stepfather intended.

34. On 29 June 2022 Mrs Hill made an affidavit commenting on the wording in clause 11 of the will. She said it contained a typing error and that the deceased intended that the residuary estate be divided between the legatees named in clauses 4.1 to 4.8 in equal shares. She said she believed that when the deceased signed the will *"he assumed that it would be correct and failed to notice the error in the division of residue"*. Read in context, the typing error to which Mrs Hill was referring was the phrase "*in accordance with the provisions relating to each gift"* appearing at the end of clause 11.

35. On 1 July 2022 the Claimant issued a second or amended claim form using the same claim number as the first naming the charities as Defendants. The second claim was accompanied by Particulars of Claim with annexures.

36. A Defence was served on behalf of the charities on 26 July 2022 opposing the claim for rectification. On the question of how the residuary estate was to be divided, it was contended that on a proper construction an equal division between the beneficiaries named at clauses 4.1 to 4.8 with one share per sub-clause was appropriate. A Reply to Defence was filed dated 15 September 2022.

37. At a directions hearing on 13 October 2022 Master Kaye directed that the family members be joined as the Fourth to Eighth Defendants. Joshua Pead was appointed to represent the estate of the late Lisa Pead. It was directed that by 4pm on 16 December 2022 all parties must serve witness statements setting out the evidence of fact on which they relied.

38. On 8 December 2022, GWCA Solicitors, who on 7 November 2022 had merged with and incorporated BBMW, served on the charities and the Claimant the witness statement of Mrs Sartin dated 7 December 2022 together with a notice under section 2(1) of the Civil Evidence Act 1995 with regard to her evidence accompanied by a medical report and a witness statement of Mrs Hill dated 7 December 2022. The Claimant served his own second witness statement dated 16 December 2022.

39. At the beginning of the trial I was asked by Mr Timothy Clarke, counsel for the Claimant to give him permission on behalf of the Claimant to cross-examine Alison Hill on her witness statement. The basis of this submission was that in substance and reality Mrs Hill and Mrs Sartin were not

witnesses being called by the Claimant. Neither the Claimant nor his solicitors had been responsible for the preparation of those witness statements. The witness statements had been prepared by their solicitors, GWCA Solicitors, following the merger of BBMW and GWCA on 7 November 2022, and served by them on Withers LLP, the solicitors acting for the charities and on the Claimant's solicitors, Cognitive Law. I was referred on this issue to the judgment of Miles J. in *Ocado Group plc v McKeeve* [2021] EWHC 3542 (Ch) given at a directions hearing in committal proceedings. The judge granted an application by the Claimant for an order pursuant to CPR 81.7(1) compelling two potentially relevant witnesses to attend the trial of the committal application so that they could be cross-examined by both sides.

40. I acceded to Mr Clarke's application and gave my reasons for doing so orally on 18 January 2023. I accepted the submission of Mr Clarke that Mrs Hill and Mrs Sartin were not in substance or reality witnesses of the Claimant. Their position has some similarity to that of attesting witnesses who are treated by the probate court not as witnesses of either party but of the court. The court has in a probate claim its own interests in the administration of justice and has a reason to seek to understand the events as completely as possible. The position is analogous in a claim to rectify a will on the basis that it fails to carry out the testator's instructions where the witness statements of the solicitor or solicitors who took the deceased's instructions for the will were prepared by the solicitors or their firm without input from the Claimant's solicitors. I concluded that it would be right in the circumstances to give both parties the right to cross-examine Mrs Hill rather than treating her evidence as that of the Claimant. I concluded that it would be right for Mrs Hill to be cross-examined first on behalf of the Claimant and for the charities by their counsel then to have the opportunity to cross-examine Mrs Hill.

41. I heard oral evidence from the Claimant who was cross-examined by Mr Chandler on behalf of the charities. The Claimant confirmed that he was not present at any of the attendances by the deceased at the offices of BBMW. I see no reason to reject any of the Claimant's evidence regarding the background to the deceased making the will nor his characterisation of the deceased.

42. I then heard evidence from Mrs Hill who in accordance with my ruling was cross-examined first by Mr Clarke on behalf of the Claimant and then more briefly by Mr Chandler on behalf of the charities. I gave Mrs Hill the opportunity to say anything further to the court in reply following her cross-examination but she did not wish to do so.

43. I permitted the witness statement of Mrs Sartin dated 7 December 2022 to be admitted into evidence under section 2(1) of the Civil Evidence Act 1995 on the grounds set out in a notice dated 8 December 2022. In relation to the weight to be attached to that statement, I have taken into account that Mrs Sartin could not be cross-examined.

44. It is appropriate to start with the rectification claim. This is the Claimant's principal claim. It has to be determined first. This is not a case where the relief sought by the claimant can be achieved unless rectification is granted.

45. Section 20(1) of the Administration of Justice Act 1982 provides that:-

"If a court is satisfied that a will is so expressed that it fails to carry out the testator's intentions, in consequence-

(a)of a clerical error; or

(b) of a failure to understand his instructions,

it may order that the will shall be rectified so as to carry out his intentions."

46. In *In re Segelman, decd.* [1996] Ch 171 at 180D Chadwick J. said in relation to s20(1):-

> *"The subsection requires the court to examine three questions. First, what were the testator's intentions with regard to the dispositions in respect of which rectification is sought. Secondly, whether the will is so expressed that it fails to carry out those intentions. Thirdly, whether the will is expressed as it is in consequence of either (a) a clerical error or (b) a failure on the part of someone to whom the testator has given in connection with his will to understand those instructions."*

47. At page 184 A-B, Chadwick J. said:-

> *"In expressing that view I have kept in mind that, although the standard of proof required in a claim for rectification made under section 20(1) of the Act of 1982 is that the court should be satisfied on the balance of probability, the probability that a will which a testator has executed in circumstances of some formality reflects his intentions is usually of such weight that convincing evidence to the contrary is necessary."*

48. In *Sprackling v Sprackling* [2008] EWHC (Ch) 2696, Norris J., referred to the passage at page 184 in Chadwick J's judgment and said:-

> *"This emphasises that speculation is no basis upon which to interfere with a formal expression of testamentary intentions. One must be*

> *confident that the will as expressed does not record the instructions given because of error or misunderstanding, "confident" in the sense of being satisfied on the balance of probabilities by evidence of a quality commensurate with the inherent probabilities of the case itself."*

49. The weight to be attached to the fact of execution of the will may however be diminished by the terms of the will itself. In *Segelman* at 184B-C Chadwick J. stated:-

> *"I should observe, however, that the weight to be given to the fact of execution is diminished by the difficulty in construction which the proviso to clause 11(a) presents. It is artificial to assume that a testator must know what he is doing if he uses language the effect of which cannot be ascertained without a decision of the court."*

50. The Claimant's case on rectification is that the deceased intended that only the family members referred to in clauses 4.1 to 4.3 and not the charities referred to in clauses 4.4 to 4.8 to share in his residuary estate.

51. It was submitted by Mr Timothy Clarke on behalf of the Claimant that the principal evidence is that contained in the BMBW will file which is contemporaneous with the preparation and execution of the will. He submitted that the more recent evidence in the form of the witness statements of Mrs Hill and Mrs Sartin dated 7 December 2022 were less reliable.

52. Mr Clarke submitted that the best evidence as to the deceased's intentions regarding the division and sharing of his residuary estate was Mrs Hill's attendance note dated 27 July 2016. The Claimant relies in particular on the sentence in Ms Hill's attendance note dated 27 July 2016:-

"The Residue is to be divided between those people mention in clauses 4.1 to 4.8 in equal shares."

53. Mr Clarke submitted that the use of the word "people" in that attendance note was distinctive. Mr Clarke submitted that both in ordinary language and legal language, people differ from organisations and charities. He submitted that in ordinary language "people" is used to refer to living persons.

54. Mr Clarke further submitted that:-

(i)there is no reference in any of the deceased's typed or handwritten notes to the charities sharing in residue;

(ii) the draft will sent to the deceased following the meeting on 13 July 2016 did not leave any part of residue to the charities;

(iii) there is no attendance note or record of any discussion with the deceased thereafter concerning the reasons for making a very significant change in order to give the charities, on their case, 62.5% of the residuary estate;

(iv) the increases in the pecuniary legacies to the charities which formed part of the deceased's instructions to Mrs Hill on 27 July 2016 make little sense if the deceased also intended to give them a share of his residuary estate;

55. On behalf of the charities, Mr Chandler submitted that the will is the product of the deceased's instructions, which clearly changed after the 13 July attendance, as expressed to Mrs Hill at the 27 July attendance. He submitted that the closest evidence of the deceased's intentions were Mrs Hill's contemporaneous manuscript notes of his instructions in the form of her manuscript annotations on the draft will. Mr Chandler submitted that Mrs Hill's manuscript annotation alongside clause 10:-

"÷ between all those mentioned in Clauses 4.1-4.8"

showed quite clearly that the deceased intended to benefit the charities and was fatal to the Claimant's rectification claim.

56. In relation to the reference to *"those people"* in Mrs Hill's attendance note, Mr Chandler submitted that there is nothing unusual or surprising about referring, in a note of a meeting, to a group which includes charities, as *"people"*. He submitted that the Claimant's case depended on an overly literal or technical interpretation of that word.

57. Mr Chandler submitted the Claimant's reliance on the word *"people"* in the attendance note was inconsistent with Mrs Hill's manuscript annotation on the draft will which referred to *"all those mentioned"* in all eight subclauses. Mr Chandler submitted that had Mrs Hill understood the deceased's instructions to be that only family members named in clauses 4.1-4.3 should share in residue she would have referred to those three subclauses alone.

58. Mr Chandler submitted that furthermore, the Claimant's position was inconsistent with the evidence of Mrs Hill in her witness statement of 7 December 2022. He relied in particular on paragraph 6 in which Mrs Hill states:-

"In view of matters reoffered (sic) to above and from my clear recollection of instructions received as supported by my contemporaneous attendance note [of] 27 July 2016, my clear recollection is that the Testator Mr McKay intended the Gift of Residue to be divided equally between all the beneficiaries referred to in clause 4.1 to 4.8 of his Will and that no other meaning was intended by him."

Mr Chandler also relied on Mrs Sartin's statement in paragraph 9 of her witness statement that:-

"it was my understanding from instructions and from Alison Hill's attendance note 27 July 2016 that the Testator intended the residuary estate to be shared equally between the beneficiaries named in clauses 4.1-4.8 that is to say to be divided equally between them."

59. The issue at the heart of the rectification claim is what were the deceased's intentions with regard to the disposition of his residuary estate. To answer this question the court must look at all the extrinsic evidence as to the deceased's intentions. The starting point is the initial instructions given by the deceased to Mrs Sartin on 13 July 2016 and the initial draft will sent to the deceased following the first appointment. The structure of the draft will was to leave money gifts to the family members and the charities and to leave the residuary estate in unequal shares (75/25) between the deceased's two step-children with in the case of Steven Pead a provision for his issue to take by substitution if he failed to take a vested interest.

60. The extrinsic evidence shows that the deceased reviewed the draft will and annotated the changes he wanted to be made to it. These included increasing the amounts of the pecuniary legacies to each of the charities. The gift of a 75% share of residue to Steven Pead was shown to be amended to 25%. This left 50% of residue undisposed of.

61. The deceased also left undated manuscript notes saying that everything else was to be distributed as his executor wishes or sees fit. These notes were not put in cross-examination to Mrs Hill and there is no evidence that either she or Mrs Sartin saw them.

62. It is against this background that Mrs Hill's notes of the changes that the deceased wanted to be made to the draft will fall to be considered. Mrs Hill made manuscript notes on the draft will and after the meeting prepared an attendance note. The attendance note on the will file is a typed document.

These are the only documents available to the court which record the instructions given by the deceased to Mrs Hill on 27 July 2016.[1]

63. The two documents record one set of instructions. The typed attendance note is, as Mrs Hill agreed in cross-examination, the fuller document. The manuscript annotations are in note form. The attendance note adopts more of a narrative style.

64. The two documents both record the deceased wanting 25% of the proceeds of the house to go to Steven Pead and 25% to Keith Pead with 50% going to residue. The manuscript amendment records that residue is *"÷ between all those mentioned in clauses 4.1-4.8"*. The attendance records that the residue is to be divided *"between those people mention in clauses 4.1 to 4.8 "in equal shares"*.

65. A central plank of the Claimant's rectification claim is the reference to *"those people"* in the attendance note. As a matter of ordinary language, I agree with Mr Clarke that the word "people" like "persons" is normally used to refer to individual or living human beings. The word "people" may be used to refer to persons in general or to persons defined by a grouping such as a nation, state, community or family.

66. Mr Chandler submitted that the Claimant's approach is overly literal and adopts a too technical or dictionary-based approach. He points out (i) that in the manuscript annotation against clause 10, Mrs Hill referred to division

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[1] Mrs Hill was referred to a letter dated 11 October 2022 written by BBMW in reply to a letter from the Claimant's solicitors, Cognitive Law dated 30 September 2022. The letter was written under the reference of Mr Tim Deacon but states that the contents of Cognitive Law's letter had been *"carefully considered by our Mrs Hill"*. Mrs Hill said she had never seen Cognitive Law's letter and had not approved Mr Deacon's reply to it. Under the heading "The Attendance Note dated 27 July 2016", the letter states that the reference to "those people" was wording used to encompass the group rather than the non-charitable legatees. The letter at the top of the second page then states:-

> *"The handwritten notes referred to clauses 4.1 to 4.3 rather than 4.1 to 4.8 but the deceased was very clear that the residue was to be divided* ***equally*** *between all those mentioned in clause 4".*

Mrs Hill said there were no more handwritten notes. The reference to the handwritten notes referring to clauses 4.1 to 4.3 was unexplained before me. I have proceeded on the basis that the only handwritten notes were the manuscript annotations made by Mrs Hill on the draft will and that those notes were mis-read by Mr Deacon. It is unsatisfactory that this potentially significant error was not corrected by anyone on behalf of BBMW prior to the trial.

between *"all those mentioned in clauses 4.1 to 4.8"* (emphasis added) and that (ii) both the typed attendance note and the manuscript annotation on the draft will refer to clauses 4.1-4.8. Mr Chandler submits that had Mrs Hill intended by her reference to "people" only to refer to the beneficiaries mentioned in clauses 4.1 to 4.3 then she could and would have referred to those three subclauses alone.

67. Mrs Hill in her witness statement quotes the penultimate paragraph of her attendance note in full but does not refer to the use of the expression *"those people"*. Asked in cross-examination by Mr Clarke to explain the reference to *"those people"*, in her typed attendance note, Mrs Hill said that the word "people" in her attendance note was just a generic term that she used to refer to all those in clauses 4.1 to 4.8. When asked again by Mr Clarke why she referred to *"those people"* in her attendance note Mrs Hill said:

"I don't know why I used it".

She said that *"people"* was not what he [the deceased] said to her and was just a generic term she had used in her attendance note.

68. Mrs Hill said in her oral evidence that she remembered the interview because the deceased wanted comments on the gifts to his children to be included. She said she was clear that residue was to be divided between all those mentioned in clauses 4.1 to 4.8.

69. Mrs Hill was much less clear in her oral evidence as to the manner of division. Mr Clarke put to her the position of the charities that equal division meant divided into eight. Mrs Hill said:-

"That is what I am saying. One eighth each".

Mr Clarke then pointed out the words in her attendance note *"all of those mentioned"*, Mrs Hill replied:-

"I don't recall him specifying by clause. His instructions were between the people mentioned in clauses 4.1 to 4.8".

70. Looking at the state of the evidence as a whole and all the circumstances I am not satisfied on the balance of probabilities or with a sufficient degree of confidence to order rectification that the deceased intended that his residuary estate be divided only amongst the family members. Mrs Hill's manuscript annotation on the draft will records that there was to be division between all those mentioned in Clauses 4.1 to 4.8.

71. I am however satisfied on the balance of probabilities that it was not the deceased's intention that his residuary estate should be divided between all those mentioned in clauses 4.1 to 4.8 in equal shares.

72. The reference to *"in equal shares"* appears in the attendance note but not on the manuscript annotation to the will made by Mrs Hill. There is no evidence that Mrs Hill discussed with the deceased on what basis there would be equal division or that the effect of equal division would be that the charities would receive 5/8ths of residue if the equal division was by subclause or 5/11ths if by number of named beneficiaries.

73. It is instructive to look at what happened after the deceased's meeting with Mrs Hill on 27 July 2016. Mrs Sartin says in paragraph 8 of her witness statement that on 29 July 2016 she considered the details of Mrs Hill's attendance note and the notes made by Mrs Hill on the draft will. Mrs Sartin wrote a further letter to the deceased dated 29 July 2016 enclosing a further draft will and raising two points on clauses 8, 8.1, 8.2 and 8.3 in the further draft will.

74. By letter dated 30 September 2022 the Claimant's solicitors, Cognitive Law asked BBMW who drafted the final will. By letter dated 11 October 2022 BBMW stated it was not able to accurately answer that question. BBMW stated that it was Mrs Hill's practice to pass instructions on to her assistant for her to prepare the revised draft for execution. In Mrs Sartin's answers to that letter provided by GWCA Solicitors (incorporating BBMW solicitors) on 9 January 2023 it is stated that the second draft will was prepared from Mrs Hill's notes and was in the precise terms of the engrossed will of 3 August 2016.

75. Mrs Sartin's attendance note of 3 August 2016 records that the deceased had not received her letter of 29 July 2016 which enclosed the further draft will. It follows that the first and only opportunity the deceased had to review the terms of the will as amended were in the reception area of BBMW on 3rd August and then with Mrs Sartin.

76. Mrs Sartin's attendance note of 3rd August 2016 refers to her going through the letter and explaining the basis of her questions. Those questions were on clauses 8, 8.1, 8.2 and 8.3 and not on the division of residue in clause 11.

77. Had clause 11 been discussed and reviewed by Mrs Sartin with the deceased, the omission of any words specifying how residue was to be divided between the beneficiaries named in clauses 4.1 to 4.8 would surely have been picked up.

78. Instead, Mrs Sartin, as recorded in her attendance note, suggested that the deceased sign *"the present will as a holding Will"*.

79. Clause 11 of the will as executed by the deceased on 3 August 2016 reads:-

"Subject as above my Trustees shall hold my Residuary Estate upon trust for such of the beneficiaries named in Clauses 4.1 to 4.8 inclusive absolutely as shall survive me and in accordance with the provisions relating to each gift."

80. Clause 11 does not expressly state that residue is to be divided in equal shares.

81. Looking at the evidence as a whole I find that Mrs Hill's annotation on the draft will most accurately records the deceased's instructions in relation to the division of residue and that it was the limit of her instructions. I find that the reference to *"in equal shares"* was added by Mrs Hill in the attendance note as her inference or understanding but without the method of division of residue having been discussed or reviewed by her with the deceased. Although it is no more than speculation, had the issue of division been raised, the deceased might have said either that division was to be as decided by his executor or that it was to be pro rata and in proportion to the size of the pecuniary legacies.

82. I am not however satisfied by convincing proof that clause 11 of the will should be rectified so as to refer only to the family members in clauses 4.1 to 4.3. I understand the basis for the argument advanced on behalf of the Claimant in view of the terms of the attendance note but in my judgment it is not possible to be confident on the balance of probabilities that that was what the deceased intended. For those reasons the rectification claim must fail.

83. In these circumstances, I must determine how clause 11 in the will as executed should be construed.

84. In *Marley v Rawlings* [2015] AC 129 at 144 Lord Neuberger PSC stated that when interpreting wills the court should follow the approach used when interpreting a contract even though a will is made by a single party. In paragraph 19 Lord Neuberger said:-

"When interpreting a contract, the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words, (a) in the light of (i)the natural and ordinary meaning of those words, (ii) the overall purpose of the document, (iii) any other provisions of the document, (iv) the facts known or assumed by the parties

at the time that the document was executed, and (v) common sense, but (b) ignoring subjective evidence of any party's intentions."

85. Section 21 of the Administration of Justice Act 1982 sets out in the context of interpreting a will rules as to evidence. It provides:-

"(1)This section applies to a will-

(a)in so far as any part of it is meaningless;

(b)in so far as the language used in any part of it is ambiguous on the face of it;

(c)in so far as evidence, other than evidence of the testator's intention, shows that the language used in any part of it is ambiguous in the light of the surrounding circumstances.

(2)In so far as this section applies to a will extrinsic evidence, including evidence of the testator's intention, may be admitted to assist its interpretation."

86. In paragraph 25, Lord Neuberger said that in his view, section 21(1) confirmed that a will should be interpreted in the same way as a contract. However, he said, section 21(2) goes rather further. It indicates that, if one or more of the three requirements set out in section 21(1) is satisfied, then direct evidence of the testator's intention is admissible, in order to interpret the will in question.

87. In my judgment clause 11 of the will is ambiguous in that it does not make clear how the residuary estate is to be divided. The phrase *"in accordance with the provisions relating to each gift"* more naturally refers to the terms relating to each gift rather than to the size or proportions of each gift. It is however possible to read the phrase *"the provisions relating to"* as referring to the proportions or amounts of each gift, albeit in clumsy language.

88. On behalf of the charities Mr Chandler submitted that the issue was straightforward. He submitted that the extrinsic evidence including the attendance note of the 27 July attendance was plain and made it clear that an equal division was intended. He further submitted that the structure of clause 4 suggested it was to be equal division by sub-clause. In my judgment if equal division had been intended it would have been by named beneficiary not by sub-clause.

89. For the reasons set out above however I do not consider that the attendance note can be relied on as reliable extrinsic evidence that the deceased intended the residuary estate to be divided in equal shares between the family members and the charities. Nor do I consider that this was established by the evidence of Mrs Hill or Mrs Sartin.

90. Looking at the differing amounts of the pecuniary legacies in clauses 4.1 to 4.8 I consider it much more likely that the deceased intended that his residuary estate should be divided pro rata between the named beneficiaries in accordance with the size of the legacies. On the evidence as a whole I do not consider that it was the intention of the deceased that his residuary estate should be divided in equal shares between the family members and the charities. The legacies to the charities range in size between £2,000 and £12,000. The legacies to the family members start at £10,000 to the deceased's step great granddaughter and increase by generations to £20,000 and £50,000.

91. Further, once the reference in the attendance note of Mrs Hill to *"in equal shares"* is excluded as reliable extrinsic evidence, it is not possible to construe clause 11 as providing for division in equal shares in the absence of other reliable extrinsic evidence supporting equal division.

92. Following the attendance on 27 July 2016 Mrs Hill had no cause to review her instructions in the lifetime of the deceased.

93. Mrs Hill has then been required to revisit her notes some six years after her last attendance on the deceased on 27 July 2016. The context in which she has done so is that of a claim form alleging negligence by BBMW in the preparation of the will. In my judgment, this has led Mrs Hill to overstate the clarity and certainty of her recollection and understanding of that part of the deceased's instructions that related to the disposition of his residuary estate.

94. Mrs Sartin's statement in paragraph 9 of her witness statement that it was her *"understanding of her instructions and from Mrs Hill's attendance note of 27 July 2016 that the deceased intended his residuary estate to be shared equally between the beneficiaries named in clauses 4.1 to 4.8"* falls to be considered against the background of how the will was amended following the deceased's appointment with Mrs Hill on 27 July 2016.

95. Earlier in paragraph 9 of her statement Mrs Sartin says that she went through the amended will with the deceased who told her he had not received her letter of 29 July 2016. There is no reference in Mrs Sartin's attendance note of 3 August 2016 to her going through and discussing with

the deceased the terms of the will apart from two points referred to in her letter of 29 July 2016 and no commentary was provided by her on clause 11 of the further draft will in her letter of 29 July 2016.

96. The mistakes made in the will including in clause 11 itself strongly suggest that Mrs Sartin did not go through clause 11 with the deceased. The omission from clause 11 of any wording directing as to how residue was to be shared would surely have been noticed by Mrs Sartin.

97. It was pleaded in the defence on behalf of the charities that if not capable of being remedied by construction, clause 11 should be rectified to reflect such equal division but no further.

98. Mrs Hill in her affidavit sworn on 29 June 2022 said she was satisfied that the phrase*" and in accordance with the provisions relating to each gift"* was a typing error and that the deceased intended the residuary estate to be divided between the legatees referred to in clauses 4.1 to 4.8 in equal shares.

99. In my judgment any such claim for rectification should have been brought by counterclaim stating what ground under section 20(1) of the Administration of Justice Act 1982 was relied on. The ground relied upon could only be clerical error.

100. More importantly and as a matter of substance, the evidence of Mrs Hill and Mrs Sartin does not attempt to explain or clarify how such a typing error arose. It is not even known for certain by whom the further draft will was prepared.

101. For the reasons stated above my conclusions are:-

(1) That the rectification claim fails.

(2) Clause 11 of the will should be construed as providing for the residuary estate to be divided between each beneficiary named in clauses 4.1 to 4.8 pro rata according to the proportion that that beneficiary's legacy bears to the total gifts made under clause 4.

102. It is accepted by BBMW that a clerical error was made by BBMW in not recording the deceased's intention to increase the legacy under clause 4.7 to Cancer Research UK from £5,000 to £6,000. I will direct that clause 4.7 be rectified to increase that legacy from £5,000 to £6,000 and that the pro rata division of residue proceed on that basis.

103. I am grateful to both counsel for their written and oral submissions.

104. This Judgment will be handed down remotely at 10.30am on Wednesday 22 March 2023. I would be grateful to receive typographical corrections from counsel by 4.30pm on Tuesday 21 March 2023.