IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BIRMINGHAM DISTRICT REGISTRY

Claim No. 1BM30561

Civil Justice Centre
Priory Courts
33 Bull Street
Birmingham
B4 6JX

Friday, 16th November 2012

Before:

HIS HONOUR JUDGE COOKE

Between:

CHRISTOPHER KELL

Claimant

-v-

J. JONES & 18 OTHERS

Defendant

Counsel for the Claimant: MR. CLARK

Counsel for the 16th, 17th, 18th & 19th Defendants: MR. LEARMONTH

JUDGMENT

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APPROVED JUDGMENT

1. THE JUDGE: This is a claim for rectification of the will of Mrs Joan Pittaway. The will was dated 15th December 2010 and Mrs Pittaway died shortly after that, on 21st January 2011.

2. The claimant, Mr Kell, is one of the two executors named in the will and he is also a beneficiary of it. The defendants named are the other beneficiaries. The terms of the will as drafted included clause 4 providing for specified money legacies to 15 named relatives and four charities, and those beneficiaries are all named as defendants to the action. By clause 6, the residue was to be held on trust "…to be paid after funeral expenses and tax by division equally among such of the beneficiaries named in clause 4, as shall survive me and if more than one in equal shares".

3. The error alleged for which rectification is sought is that the testatrix's intention was to divide the residue of her estate amongst the family members only, that is to say the first 15 of the persons named in clause 4, but not to include the four charities. The net estate amounts to in round terms £560,000 and the money legacies referred to are in total £89,000 of which £7,500 falls to be divided amongst the four charities. The effect of the issue as to whether they are or are not entitled to a share in the residue is therefore of the order of £25,000 for each of the charities concerned or £100,000 in total.

4. The claim for rectification is opposed by the four charities, for whom Mr Learmonth appears. They were, as is I think normal, alerted to the presence of gifts to them in the will when probate was granted. Mr Kell paid the money legacies to them and invited them to agree to a distribution of the estate without their share in the residue, but they were not prepared to do that and it is that that has led Mr Kell to issue this claim for rectification.

5. The court's power to rectify a will is set out in section 20 of the Administration of Justice Act 1982, sub-section (1) which provides:

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

6. The approach of the court to the question of rectification was agreed by both counsel to be that which was summarised by Mr Justice Chadwick as he then was, in *Re Segelman* in 1996, as involving the resolution of three questions:

> (1) What were the testator's intentions with regard to the dispositions in respect of which rectification is sought;
>
> (2) Secondly, whether the will is so expressed that it fails to carry out those intentions;

(3) Thirdly, whether the will is expressed as it is in consequence of either:

1. clerical error; or

2. a failure on the part of someone, to whom the testator has given instructions in connection with his will, to understand those instructions.

3. It is accepted that the burden of proof is on the person seeking rectification in so far as all these matters require to be established. As to the standard of proof (which is primarily applicable to the evidence required to establish the testator's intentions, given that that must be established by evidence extrinsic to the will in the nature of matters in relation to applying for rectification) that is accepted to be, again as Mr Justice Chadwick summarised it:

> "Although the standard of proof required in a claim for rectification made under section 20(1) of the 1982 Act is that the court should be satisfied on the balance of probabilities, 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."

Thus, the contrary intention of the testator must be established by convincing evidence.

7. In this case, the first and the third questions are in issue. Evidence has been provided which is said to establish the true intention of the testator and the question is whether that evidence is sufficient to satisfy the burden of proof. If it is, then it is accepted by counsel for both sides that the will, as drawn, fails to give effect to those intentions. But the third question arises, whether that failure is a consequence of a clerical error as that phrase is used in the section and defined in law.

8. On the first of these questions, the intention of the testatrix, the only live witness in respect of that evidence is the person who is best able to speak to it and that is Mr Pannifer, the solicitor to whom she gave her instructions and who prepared the will at the time. His evidence, supported by documents from the file of the firm of solicitors at which he was employed at the time, is that he saw Mrs Pittaway at her home on 22nd November 2010 for the purpose of taking her instructions. He had had some limited previous connection with her in that he had acted in relation to the estate of her husband who had died a little while beforehand. He was able to take with him a copy of her existing will, which had been prepared in 1992, not by Mr Pannifer but by a former employee of his then firm, and at that meeting she explained her instructions to him. He prepared an attendance note of that meeting. It is relatively short and I read the material paragraphs from it.

> "I had with me Mrs Pittaway's existing will and enquired if she would like me to run through it with her, with her stopping me at the appropriate stages, or if she would like to tell me what changes she wished to make. Mrs Pittaway reached on her table and produced a handwritten back of envelope set of instructions. We worked our way through the instructions. Joan [*that is a reference to somebody named on those instructions*] is Joan Jones. Joan is not to be an executrix; Mrs Pittaway says she puts too much on Joan. Going through the instructions and marrying up figures against names and noting that even after the substantial legacies, Mrs Pittaway will still have a significant residue and she said that she would indeed, her house for example. I asked Mrs Pittaway if she had any ideas as to how she would split the residue and she

> said it should go to the beneficiaries she had already named. I asked if it would be equally between them or split into the proportions that they received their legacies, ie Joan Jones receiving considerably more of the residue than the others, for example Steven Pittaway receiving double Cheryl Pittaway. Mrs Pittaway said simply, "Equally". Asking what would happen if a beneficiary died before her, I said the beneficiary's share could either go equally between the other beneficiaries or to that beneficiary's own children. Mrs Pittaway said it would go to that beneficiary's children and they would be lucky devils."

9. The note that she refers to is in the bundle at page 44; that is in Mrs Pittaway's own handwriting and it is a list of names with figures written against them. It begins with Joan, being Joan Jones to whom Mr Pannifer referred in his note, and against her name is written £50,000. The following names have different amounts written against them but they are only the names of individuals and they do not include the names of the four charities. Underneath those names are some words added by Mr Pannifer in his own handwriting which he was kind enough to read for me in the witness box and it says, "= to their children, lucky devils"; that was no doubt his transcription of what Mrs Pittaway said to him, as recorded in his own note. At the foot of the note there is some more handwriting of Mrs Pittaway, which reads as follows:

> "My jewellery to be sold and proceeds added to estate."

10. What Mr Pannifer does not refer to in that note is a second document which Mrs Pittaway had with her at that meeting, which was a copy of the 1992 will, on which she had marked some amendments. It will be recalled that Mr Pannifer had himself taken a copy of the 1992 will with him. Mrs Pittaway had her own copy there at the meeting. Mr Pannifer's evidence was that she had read out to him some of what she had written on that, referring to the gifts she wanted to make to charities. He could not recall whether he had taken away a copy of that document with him from the meeting but a copy has been provided on disclosure and it appears and is, I think, accepted that it came from the file of the solicitors firm for whom he was working at the time, so the implication must I think be that Mrs Pittaway not only produced that copy and read to him from it at the meeting but that he took it back to his office at the end. It must, I think, also be likely of course that if it was handed to him at that meeting he will have looked at what was on it at the time.

11. The 1992 will is in a slightly different general form to that which was signed in 2010. The layout of it was that there were two clauses providing for specific money legacies to family members (clauses 4 and 5). The only two family beneficiaries receiving money legacies were her two named executors and each of them was given a sum of money conditional on accepting one as executor. There was then a clause 6 divided into three sub clauses making money gifts to three charities and finally clause 7 making a gift of residue which, after providing for debts and tax, provided that the residue would be divided amongst four sets of family relatives in specified proportions.

12. On the copy that Mrs Pittaway had at that meeting, what she had marked on it was as follows. Firstly, she had crossed out the names of the executors and clauses 4 and 5 providing for money legacies to them. It appears that the two executors were dead and Mr Pannifer had noted in his attendance note that that was one of the reasons why Mrs Pittaway wanted to make changes to her will. On the clause dealing with the

charities, she had made one change, which was in the amount that was to be given to the Arthritis and Rheumatism Council, where she had crossed out the figure of £1,000 and inserted in manuscript £2,000. At the foot of that clause, she had made a manuscript note adding a fourth charitable gift, she had written, "£3,000 to Cancer Research Charity" and that is what came to be reflected in the later will. In the clause dealing with residue, she had simply crossed out the names of all the individuals who were to share in the residue. She had not written anything else in place, she had not written any other names or any other provision indicating how she wanted the residue to be divided. What she had done, however, was at the very foot of the final page of the will she had written this in manuscript:

> "Jewellery to be sold and proceeds to be added to the estate and equally shared by family named above."

Now the point is taken that if one reads that literally having crossed out all the names in the will there were no 'family named above' so the question arises as to what family was she referring to and also what exactly did she mean by reference to, "Jewellery being sold and the proceeds being added to the estate and equally shared by the family named above".

13. Mr Pannifer's evidence was that Mrs Pittaway's intention was that the division of residue should be amongst the 15 family members named on the separate manuscript note that she had produced. It was put to him that his attendance note said that she had told him that the residue should go to the beneficiaries she had already named and that the beneficiaries she had already named included both the individuals recorded on that note and the charities referred to on the copy of the 1992 will that she had produced and read from. Mr Pannifer accepted very fairly that read literally and perhaps in the way that lawyers use the term, all of those people were "beneficiaries". However he was quite clear that in the context of the meeting and what Mrs Pittaway had conveyed to him, she was using the expression "beneficiaries" to refer to the individuals named on the note she had provided and not the charities that were listed on a separate document ie the copy of the 1992 will.

14. Mr Learmonth's position on behalf of the charities is that it was accepted by them that Mr Pannifer had genuinely formed that impression at the meeting, that he had come away from the meeting with that impression and that he had attempted to give effect to it. The matter was put on the basis that he had formed that impression without having anything positive to go on and accordingly it was more his assumption than reliable evidence of Mrs Pittaway's actual intentions, and, given that the court may only act on convincing evidence of the testator's intentions, it was then suggested that Mr Pannifer's impression was not sufficiently supported for it to be accepted as convincing evidence.

15. I should start by saying I think that taken in the round, I do accept Mr Pannifer's evidence and I do regard it as convincing. There are a number of matters, it seems to me, which support the interpretation that he put on what was said to him, particularly, in my view, the note that Mrs Pittaway had made at the foot of her copy of the 1992 will. She had made, of course, two notes in relation to jewellery, one on the list of family beneficiaries and one on the old will. The note on the list of beneficiaries simply provided that the jewellery was to be sold and the proceeds added to the estate; it did not say anything about the division of the estate. What she had written on the will was that the jewellery was to be sold, the proceeds to be added to the estate and then she had

added the following words, "and equally shared by family named above". This I think shows first of all, of course, that she had no particular wishes in regard individual pieces of her jewellery but it also seems to me to show that she had some thought as to what was to be happening to her estate.

16. It was suggested that the reference to adding the jewellery to the estate did not necessarily mean that it was being added to the residuary estate and that the reference to it being equally shared did not necessarily mean that the residuary estate was being equally shared, but I am bound to say that I think that has an air of some unreality, looking at this wording in the context of somebody who is not a lawyer, seeking to express what she wishes to happen to her property. It seems to me that the most natural interpretation of these words is that she wishes the jewellery to be sold, perhaps in distinction to having individual items divided up amongst the beneficiaries, and the proceeds then to be added to the estate and those proceeds, the result of that addition, are then to be equally shared by the family named above. In that respect, it seems to me, she must have been referring to the division of the residuary estate and she was looking then as to what would happen after the payment of the money legacies that she had in mind.

17. It is true, of course, that again taken literally, there were no family named above on the piece of paper on which she wrote those words. Whatever she had in mind at the time she wrote the words 'named above' on the piece of paper. It seems to be clear in context that by referring to 'the family named above' she must have been intending to refer to family members whom she would identify and in due course she identified them by producing the separate list that she gave to Mr Pannifer. So taking the combination of the two documents, it seems to me fairly clear that she was indicating, via this note and via the separate list of beneficiaries that she had produced, that her intention was that the residuary estate would be divided amongst the family members that she chose to name by writing on the separate piece of paper.

18. It was not Mr Pannifer's evidence that he saw these particular words on the copy of the 1992 will at the meeting, or that he asked any questions about them or that they were explained to him there and then, but it is clear that they were Mrs Pittaway's words and that he took a copy of that document away from the meeting with him. The force of those words, in my view, is not that Mr Pannifer himself paid attention to them at the time or relied on them at the time but that they are separate evidence in support of Mrs Pittaway's intentions being as Mr Pannifer took them to be from what was in fact said to him at the meeting. Thus, in so far as he gained that impression, it seems to me to have been made the more reliable an impression by the fact that it is consistent with what Mrs Pittaway wrote in that note.

19. I should say that I also place great weight in evidential terms on the fact that Mr Pannifer was the only person at this meeting, that he went for the specific purpose of ascertaining what Mrs Pittaway's testamentary intentions were and that he was an experienced solicitor who was used to taking instructions for the preparation of wills and therefore to evaluating what was said to him and satisfying himself that he understood what clients said to him in order that he could carry out their intentions. Thus it seems to me to be inherently likely that the interpretation he placed upon her words and her actions and her demeanour in that meeting would be an accurate impression.

20. There are a number of other relatively minor matters which all point in the same direction. The first is that there would, I think, be a substantial conceptual change from the 1992 will if the charities were to be included in the division of residue. Looked at in the broadest of terms, both the 1992 will and what is said to be the intention of the 2010 will were structured on the basis that there were money gifts to charities and some money gifts to relatives, and then a division of the residuary estate amongst relatives. The greatest part of the estate would go under the gift of residue and it would I think be a substantial change if the charities were to move from the category of those who were given only specific monetary amounts to be included amongst those who were given a share of the bulk of the estate in the residue. It is certainly not conclusive but it is a pointer in the same direction.

21. There is also some support to be had from the evidence of Mrs Rose Morton, who provided a witness statement. She was not called to give evidence and her evidence was accepted as set out in the witness statement. She said that in a conversation after the death of her brother in about July 2010, she had spoken to Mrs Pittaway and Mrs Pittaway told her that, "I will have to leave something to the charities but it will not be a fat lot" and there was also a remark about the rest of the recipients being "lucky sods", which may be consistent with what was said to Mr Pannifer as well. Now again, that I think is not enormously significant but it is some pointer to the fact that she was not, at least at that stage, considering a significant increase in the scale of her generosity to the charities or regarding them as on an equal footing with her family beneficiaries.

22. So taking the evidence as whole, it is in my view, in combination, sufficiently convincing for me to find that the intention of Mrs Pittaway in preparing this will was that the residuary estate would be divided amongst the individual family beneficiaries and not amongst the whole class of money beneficiaries including the charities.

23. As to the second question, although it is not in issue I think I need to say a little bit about it. The second question is whether the will, as drafted, gives effect to those intentions. Both counsel appearing before me for Mr Kell and for the charities are agreed that it does not operate in that way. Mr Pannifer's evidence, however, which is of some significance later on, was that he considered at the time and still considers that the gift of residue does operate so that it only benefits the individuals and not the charities. He bases that interpretation on the language used in clause 6.5 which is as follows:

> "To pay the residue … to such of the beneficiaries named in clause 4 as shall survive me and if more than one in equal shares"

and there then follow provisions dealing with Mr and Mrs Kell and with the death of beneficiaries leaving issue. Mr Pannifer's view is that the reference to beneficiaries surviving her means that the only beneficiaries referred to are those who are individuals or, as he put it human beneficiaries, rather than all the beneficiaries named in clause 4. Mr Pannifer made clear that that was his view at the time and it is a view that he maintains to this day. I have said that counsel do not adopt that interpretation and neither do I. The construction of this will is not in itself an issue before me except as one of these questions, and as between the parties in the litigation, because it is not in dispute I do not have to rule on it. But in my view the reference to beneficiaries who survive the testator does not mean that the beneficiaries referred to are limited to those who are mortal and therefore who might not possibly survive.

24. Mr Pannifer's view is one, as I say, which he has held throughout. A number of documents were produced to that effect, which he readily accepted were accurate. At page 113, there is an email from the claimant to a partner at the firm of solicitors for which Mr Pannifer had been working at the time, seeking information from them. In that, he says:

> "When collecting the will from your offices following Mrs Pittaway's death, I queried how the will should be interpreted. My concern was that contrary to the wishes expressed by Mrs Pittaway, the charities named as beneficiaries might contend that they were entitled to a share of the residue rather than the cash bequests that were intended. Mr Pannifer replied that the reference, 'to pay the residue to such of the beneficiaries named in clause 4 as shall survive me' limited the entitlement to the residue to living beneficiaries. Mr Pannifer stated he had retained notes, including something handwritten by Mrs Pittaway, showing how she wanted her assets split and that also supported this understanding. "

25. That email was sent in May 2011 but Mr Pannifer accepted that the date on which the will was collected from his office and when that conversation took place was 26th January 2011, just a few days after Mrs Pittaway had died, about two months after the instructions had been given and six weeks or so after the will had been signed. It was clearly something that he would have had in mind at the time when he was close to the events and so no doubt speaking as to what his view was at the time. The claimant, I should say, was asking the question because he had formed the view that the language of the will was, at the very least, ambiguous. I should say that my own reading of that would be that he rather thought that it bore the contrary meaning but in the witness statement, which he was not cross-examined on, he suggested that he thought this was an ambiguity.

26. There was a further email sent by Mr Kell, this time in September 2011, at page 135. This refers to the drafting of the will and in it Mr Kell says:

> "Mr Pannifer also confirmed that as a solicitor experienced in drafting wills, he did consider if he should incorporate a Benham Ratcliffe clause. As he considered the overall wording in clause 6.5 provided that the residue should only go to living beneficiaries he did not incorporate such a clause. He would have incorporated a Benham Ratcliffe clause if he thought that the charities had an interest in the residue.".

27. Mr Pannifer explained that a Benham Ratcliffe clause was one providing for the incidence of inheritance tax where a gift was to be divided between beneficiaries some of whom were exempt from inheritance tax while others were not. First of all he was asked whether he accepted that this accurately recorded what he had said to Mr Kell, and he said that it did. It was then put to him that he had actively considered at the time whether such a clause should be included and decided not to on the basis of his interpretation of the wording used in the will and he, to some extent, stepped back from what he had previously said and said his evidence was that he did not consider that a Benham Ratcliffe clause was necessary. So to some extent that was a shading of what he was reported to have said to Mr Kell but it did not detract from his general position being that his view of the effect of the will was that such a clause was not necessary because the residuary gift did not extend to the charities.

28. With that, I come on the third question, whether the mistake that was made is to be categorised as a clerical error, as that expression is used in section 20. Mr Learmonth very carefully took me through cases exploring the meaning of the phrase 'clerical error' which is one which has been used in the present legislation but survives from the pre 1982 period when the jurisdiction of the courts to order rectification of wills was extremely limited. I will not refer to all the cases that I was taken to but it is sufficient, I think, to set out what in my view the position is at present. Mr Learmonth began with *Re Morris*, a decision of Mr Justice Latey in 1970. That of course was before the 1982 Act came into effect and he was, therefore, exploring the meaning of the phrase 'clerical error' as it existed in the law prior to that time. At page 80 of the judgment, Mr Justice Latey quoted from Mortimer's Probate Practice in the 1927 edition and he said this:

> "It is difficult to extract a definite principle from the cases on this subject. The author suggests that the cases establish the following propositions. First, where the mind of the draftsman has really been applied to a particular clause, then whether the error has arisen from the fact that he misunderstood the instructions of the testator, or, having understood the instructions, has used inappropriate language in seeking to give effect to them, the testator who executed the will is, in the absence of fraud, bound by the error so made as if it were his own even if the mistake was not directly brought to his notice and the court will not omit from probate the words so introduced into the will. Secondly, where the mind of the draftsman has never really been applied to the words in the particular clause and the words are introduced into the will *per incuriam* without advertence to their significance of defect by a mere clerical error on the part of the draftsman or an engrosser, the testator is not bound by the mistake unless the introduction of such words was directly brought to his notice."

Now that summary from the text book is not one which Mr Justice Latey accepted in terms as reflecting the law. What he actually said about it is on the following page, again after some consideration of previous cases in which the line that the author of Mortimer was seeking to draw was explored. He said this:

> "But whether the line is to be drawn as suggested in Mortimer or possibly, as submitted by Mr. Taylor, at a place which gives the court power in more cases, it is not, I think, necessary for me to decide in this case. In my judgment, wherever the line is drawn, this case on its facts falls into the category where the court has power to do what it can by omission. The introduction of the words "clause 7" instead of "clause 7 (iv)" was per incuriam. The solicitor's mind was never applied to it, and never adverted to the significance and effect. It was a mere clerical error on his part, a slip. He knew what the testatrix's instructions and intentions were, and what he did was outside the scope of his authority."

So, having read the paragraph from Mortimer, he decided that it was not necessary to draw the line (as he put it) in any different place for that case but he did not rule out the possibility that it might be drawn in a place which would give the court rather more power.

29. That is where matters rested at the date of passing of the 1982 Act. I should say that I was also referred to the considerations of the Law Reform Committee, which preceded the advent of that legislation, which considered rectification in the round and which, if

adopted, would I think have granted a rather wider power of rectification than appears to have been reflected in the Act itself. The Act itself stopped at the words 'clerical error' and added only one other category which was a failure to understand instructions. So it must, I think, be the case that Parliament intended to use the words 'clerical error' in the sense in which those words had been used in the authorities prior to that Act and given what was said about those authorities in *Re Morris*, the exact meaning of those words it seems to me, had not then been quite settled but at least the opinion of the editor of Mortimer was that it lay where it was said in the passage described.

30. In *Wordingham v Royal Exchange Trust* Mr Edward Evans-Lombe, who at the time was a Deputy High Court Judge, considered the effect of the Act in what I think was the first reported decision after it had been introduced. At page 418 he refers to Theobold on Wills and a passage very similar to that from Mortimer that was dealt with in *Re Morris*. He also cites a passage from *Re Morris* itself, which is one of those that I have referred to above. He goes on to say with some relevance to this case:

> "That passage *[ie the passage from Re Morris]* must equally apply where the error is one of omission and not inclusion".

Then on the following page 419, he cites from Australian authorities and at letter F he says this:

> "It seems to me that the words 'clerical error' used in section 21(a) of the Act of 1982, are to be construed as meaning an error made in the process of recording the intended words of the testator in the drafting or transcription of the will. That meaning is to be contrasted with an error made in carrying his intentions into effect by the drafter's choice of words and with a mistaken choice of words because of a failure to understand the testator's intentions, a circumstance covered by sub-section (b)."

He is thus there identifying and stating the law as being that errors are to be categorised in one of those three ways and the clear implication is that the first category is covered by section 21(a), the third by 21(b) but the one in the middle is not covered.

31. The matter was put similarly by Chadwick J in *Re Segelman* [1996] Ch. 171. At page 184 Mr Justice Chadwick had again referred to the passage from Mortimer that was cited in *Re Morris* and the distinction drawn in that passage. Having considered that and *Re Morris* itself and *Wordingham v Royal Exchange Trust*, he said this at page 186:

> "In my view, the jurisdiction conferred by section 21 through paragraph (a) extends to cases where the relevant provisions in the will by reason of which the will is so expressed that it fails to carry out the testator's intentions, has been introduced or, as in the present case, has not been deleted, in circumstances in which the draftsman has not applied his mind to its significance or effect. It is to this failure to apply thought that Mr Justice Latey and the editor of Mortimer attach the phrase *per incuriam*."

32. The effect of those cases, it seems to me, is that whereas the matter might have been left somewhat open in *Re Morris*, it has now been firmly stated by judges of high authority, at least at first instance, that the law makes the distinction that was identified in *Re Morris* and section 21(a) does not extend to errors that are made which are not *per*

incuriam in the sense that they do not result from the draftsman having failed to advert to the significance or effect of the words used in his draft.

33. Mr Learmonth's submission in this case is that Mr Pannifer's evidence shows that the error that he made is not an error of inadvertence, that his words in drafting clause 6 of the will were chosen in the belief at that time which – which is accepted between the parties (and I agree) to have been mistaken – that they achieved the effect that he was aware what the testatrix wished to achieve. That was his belief at the time and, as I say, it remains his belief now; it is a belief that he has asserted on a number of occasions in-between. That view of his evidence is one from which Mr Clark does not, I think, dissent and given the evidence I do not think he properly could. This is not, therefore, a case in which the solicitor acting says that he did not really consider the words at the time. It is not even a case in which, having not considered them at the time, he has sought to defend his position by adopting a retrospective view of the wording which if correct would show that he had not made a mistake. Mr Pannifer's evidence is that he had that view at the time and still has it.

34. It seems to me that there might be cases in which the evidence shows that some consideration was given to a clause but that consideration was so slight or fleeting that it could not truly be said that the draftsman had adverted to the significance of effect of the words that were used, that being the phrase that was used in the extract from Mortimer referred to. I do not, therefore, rule out the possibility that rectification might still be ordered in a case in which a solicitor's consideration of those words was on a very slight basis and without any proper thought being applied at all. The solicitor might perhaps be said to have read or focussed on the words used to some extent but not really given any proper degree of thought to what they truly meant or their effect truly was. But in such a case, the burden would be on the party seeking rectification to establish that that was the degree of thought that had been given. That is not the evidence that Mr Pannifer has given in this case. He maintains, as I have said, that he formed that view of his drafting at the time and he still holds it.

35. Nor is this a case, it seems to me, of words having been included in the will in a somewhat mechanical way, without proper consideration being given to them. Clause 6, as drafted, is not in essentially the same language as the previous will, and there has been no evidence for instance that it was derived from some precedent but not sufficiently carefully adapted. It was, in effect, a fresh clause written out at the time by Mr Pannifer who must thus be taken to have considered the words that he was writing. He knew what his instructions were, he knew what was intended to be achieved by those words and, as his evidence is, he thought he had done so by the words that he chose. There have been cases where clerical error has been held to be committed either by the erroneous failure to delete a clause from a previous draft, or an erroneous failure to amend a draft which had been prepared in the light of instructions that were subsequently given. But those are not equivalent circumstances to what we have here. Mr Pannifer came away from the meeting with Mrs Pittaway and he drafted the will after that. It is not the case, it does not appear to be the case at least, that he started with the 1992 will and crossed out or amended the words in it. He prepared a fresh draft which is constructed in a different way from the 1992 document and he therefore, it seems to me, deliberately chose the words that went in it.

36. Mr Clark suggested that this was a case of omission and he referred me to His Honour Judge Hodge's position in *Pengelly) v Pengelly* [2008] Ch 375 in which he said that the

court might more easily conclude that there had been a clerical error in a case where words had been omitted than where they had been wrongly inserted. But the suggestion that it was a case of omission seems to me to be rather artificial. There could be a number of ways of drafting a document which would achieve the effect that Mrs Pittaway wished to achieve. The form of rectification which is urged as a remedy in this case if the claimant is entitled to it, is that in clause 6 the reference to the beneficiaries in clause 4 should be amended to refer to the beneficiaries in clause 4, sub-clauses 1 to 15. In that respect it might be said that there was an error of omission in that Mr Pannifer had failed to include the reference to the specific sub-clauses. But it seems to me that there are any number of other ways in which the will could have been drafted to achieve the same effect. One would have been to follow more closely the format of the 1992 will and to have different clauses dealing with the money requests to family members on the one hand and the charities on the other and then to refer to in the residuary gift to the clause dealing with the family beneficiaries. That would have been an equally acceptable way of producing the same effect, so that the mistake could equally be characterised as the inclusion of the family beneficiaries in the same clause as the charities. There is no evidence to the effect that the draft proceeded in one particular direction and was only not effective at the end of the day because particular words had been omitted from the final version of it.

37. So it seems to me that the distinction between omission and inclusion is not a very sound basis on which to come to any conclusion in this case. I also bear in mind that it was said in *Wordingham* that the principles applied must apply equally to cases of omission and inclusion. More fundamentally, it seems to me that whether what Mr Pannifer did was erroneously to omit the words that are now suggested or whether he erroneously failed to draft the will in some other way, does not answer the fundamental point that the mistake that he made was committed advertently in the sense that I have described, which is that he knew what he wanted to achieve and thought, wrongly, that he was doing so.

38. My conclusion, therefore, is that the distinction between clerical errors and mistakes which are not inadvertent in this sense is now firmly established, at least at first instance, and it must be applied at first instance unless and until the jurisdiction of the court is expanded by a decision at a higher level. Accordingly, I come to the conclusion that this claim for rectification must fail. It is a conclusion I arrive at, I have to say, with some reluctance and regret, not in the sense that I would have wished to deprive the charities of the funds to support their purposes but only because on the basis of the jurisdiction given by statute and as the courts have interpreted it, the court is still unable to fulfil Mrs Pittaway's intentions in a case of this sort.

End of judgment

(Discussion continues in respect of costs)
