



Neutral Citation Number: [2020] EWHC 245 (Ch)

Case No: PT-2018-000331

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
Property Trusts and Probate (ChD)
In the Estate of Patrick Joseph Kelly Deceased

Rolls Building, Fetter Lane,
London. EC4A 1NL

Date: 12/02/2020

Before :

MASTER SHUMAN

Between :

VINCENT KELLY

- and -

- (1) MARY BRENNAN**
- (2) MATTHEW BRENNAN**
- (3) FERGUS BRENNAN**
- (4) VINCENT BRENNAN**
- (5) DAMIEN BRENNAN**

Claimant

Defendants

Michael Bowmer (instructed by **Beale & Company Solicitors LLP**) for the **Claimant**
Third Defendant in person
Joshua Lewison (direct access) for the **Fourth Defendant**

Hearing dates: 23 August 2019, 12 September 2019

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
MASTER SHUMAN

MASTER SHUMAN :

1. This is a claim for rectification of the will of Patrick Joseph Kelly (“the deceased”) dated 5 July 2010 (“the 2010 will”). It is made pursuant to section 20(1)(a) of the Administration of Justice Act 1982 (“the 1982 Act”). As six months has expired between the claimant being granted probate on 7 November 2014 and the claim being issued on 1 May 2018 the claimant also requires permission under section 20(2) of the 1982 Act to bring the claim. The claim is opposed by the third and fourth defendants.
2. The 2010 will currently divides the residue of the deceased’s estate into 10 equal shares. Vincent’s case is that this is a clerical error as the deceased intended to divide the residue into 6 equal shares between his siblings and, as his sister had already died, he intended to divide her one-sixth share between her 5 children.

THE PROCEEDINGS

3. The claimant (“Vincent”) is bringing this claim in his capacity as a beneficiary under the 2010 will; although he is also the executor under the 2010 will. He is one of the brothers of the deceased. The claim is brought by Part 8 claim form.
4. Vincent relies on the following evidence: his two witness statements dated 27 June 2018 and 11 January 2019; a statement from David Osborne, solicitor, dated 21 February 2018; and a statement from Brona Osborne dated 21 February 2018.
5. The defendants are the adult children of the deceased’s late sister, Maureen, also known as Mary. The defendants instructed O’Doherty Warren solicitors (“ODW”) based in County Wexford, Ireland. They initially said that the claim was contested and that the defendants would be consulting with their English appointed agents. The third defendant, (“Fergus”), and the fourth defendant, (“Vincent B”) both served acknowledgements of service contesting the claim. The first, second and fifth defendants did not. They have played no active part in the proceedings. On 31 July 2018 Osbornes Law (“Osbornes”), acting on behalf of the defendants, wrote to Beale & Company (“Beale”), who act for Vincent, stating that the defendants no longer wished to contest the claim and “that it is agreed that the estate administration can proceed in accordance with the claimant’s application”.
6. The claim was listed for a disposal hearing on 1 November 2018 but Fergus and Vincent B attended in person seeking permission to rely on witness statements, served shortly before the hearing. They indicated that their case was that the deceased had intended the gifts to be in the form set out in the 2010 will and that the deceased was domiciled in Ireland not England. I granted them permission to file and serve witness statements addressing specifically the following issues: (i) the deceased’s domicile, (ii) why they contended that the 2010 will did not contain a clerical error and should not be rectified; and (iii) why the court should not grant permission for the claim to be made under section 20(2) of the 1982 Act.
7. Fergus filed a one page affidavit sworn on 3 December 2018. Vincent B filed a 4 page statement with two exhibits sworn on 3 December 2018. This evidence did not adequately address the first or second issues.

THE FACTUAL MATRIX AND THE WILLS

8. I take the factual background primarily from Vincent's witness statements and the documents, where relevant, exhibited to the statements. Neither Fergus nor Vincent B have put in evidence to challenge the factual account given by Vincent.
9. The deceased was born on 4 February 1934 in the Irish Republic. He was one of 9 children. His siblings were Vincent, Kevin, Michael, John, James (known as Jim), Eileen and Maureen (known as Mary). The deceased never married and had no children.
10. In the early 1970's the deceased moved to England and never returned to live in Ireland. He would occasionally visit his siblings in Ireland. He was a joiner until his retirement in 1992.
11. On 18 August 2006 the deceased had a meeting with David Osborne a solicitor at R A Osborne & Son ("RAO") to give will instructions. The deceased and his family were long standing clients of RAO, usually instructing Cyril Osborne, David's father.
12. David Osborne's contemporaneous notes record that the deceased had made a will "many years ago with Cyril". In August 2006 the deceased was living at 31 Auriol Road, West Kensington, London W14 05P. He was a retired joiner and in receipt of a state pension in England and a small state pension in Ireland from the time that he undertook an apprenticeship. He held substantial assets with Barclays Bank plc in London, whom he had banked with since 1976. He also owned a property known as the Woodlands. He had 6 living siblings, James and Maureen having already passed away. The deceased instructed David Osborne to prepare a will dividing his estate between his surviving siblings. He did not wish some of his family members to inherit as he considered them to be "gamblers or spenders". The notes also record,

"Discussed residency and taxes in Ireland.

... He has a tax no. in England but not in Ireland".
13. On 18 August 2006 the deceased executed a will dividing his estate as instructed ("the 2006 will"). The 2006 will starts with the deceased's name and then states, "of Woodlands, Castledermot, County Kildare".
14. On 6 January 2009 the deceased was granted a lease of the ground floor flat, 53 Mablethorpe Road, Fulham SW6 6AQ ("the flat") by the Mayor and Burgesses of the London Borough of Hammersmith and Fulham for a term of 125 years from 29 September 2008. The premium paid was £220,000.
15. There was a family home at Woodlands, Castledermot, County Kildare which was bequeathed to the deceased by his parents; he was the only unmarried child. In 2010 the deceased sold the property. He told Vincent that as his mother had died there he would never live in it and moreover had no intention of returning to live in Ireland. He retained some of the lands near to the family home in Plunketstown Lower, Castledermot. There was an uninhabitable cottage on that land which he bequeathed to his nephews, Paul and Daniel, in the 2010 will.

16. On 5 July 2010 the deceased had a meeting at RAO, this time with Cyril Osborne, to give instructions to make a new will. Cyril Osborne's practice was to make a handwritten note during the meeting and then type up an attendance note.
17. Cyril Osborne's contemporaneous notes record that the residue was to be divided as follows,
 - “Residue including English Property to sister, Eileen Delaney, Kathleen Kelly (wife of decd brother James) brothers, Michael;, Vincent & John and the children of his deceased sister Maureen Brennan, namely

Mary, Matthew, Fergus, Vincent, and Damien Brennan in equal shares, subject only to payment of my debts etc. By equal shares I mean one-sixth to each of my siblings and remaining one-sixth equally between children of Maureen Brennan, decd.”
18. On 5 July 2010 will was executed by the deceased and witnessed by Cyril Osborne and his daughter Brona Osborne.
19. The 2010 will provided as follows:
 - i) Michael and Vincent were appointed as executors;
 - ii) the deceased's house and land at Plunketstown Lower was left to his nephews Paul and Daniel in equal shares (Vincent's sons);
 - iii) the residue including any assets in the United Kingdom were bequeathed to,

“my sister, Eileen Delaney, my sister in law, Kathleen Kelly (wife of my deceased brother, James Kelly) and my brothers, Michael Kelly, John Kelly and Vincent Kelly and my niece Mary Brennan and my nephews, Matthew, Fergus, Vincent and Damien Brennan (the children of my deceased sister, Maureen Brennan) in equal shares absolutely subject only to the payment of my debts, funeral and testamentary expenses.”
20. The 2010 will gives the name of the deceased and then says of Plunketstown Lower, Casteldermot in the County of Kildare.
21. On 9 June 2014 the deceased died aged 80 years. His death certificate records that his usual address was the flat but that he died at Norbury Hall, 55 Craignish Avenue, Norbury, SW16. I am told that this is a care home that he had moved to on 27 November 2013. The Inland Revenue affidavit dated 21 December 2015, sworn by Vincent, states that the deceased's domicile of origin was Ireland but that his domicile at death was England.
22. The deceased's estate in Ireland had a value of €80,786 after funeral and testamentary expenses. The estate comprised the land and bungalow with a value of €75,000 and

two bank accounts. The deceased's estate in England had a net value after testamentary debts of €2,073,154. It included the flat with a value of €693,000, bank accounts with Barclays Bank plc with balances of €217,178, a share portfolio held by Barclays Bank plc €574,555, and investment bond with Legal & General €649,508.

23. Vincent as executor instructed Hubbard Pegman & Whitney LLP (“HPW”), solicitors in London. On 7 November 2014 there was a grant of probate to Vincent with power reserved to another executor. The grant was extracted by HPW. The net value of the estate was £1,642,080. The grant records that the deceased was domiciled in England and Wales.
24. On 25 April 2016 the High Court in the Republic of Ireland granted probate to Vincent, preserving the rights of the other executor. The grant was extracted by Parte & Associates Solicitors. The net value of the estate was €80,786.

THE LAW

Section 20(1)

25. Section 20 of the 1982 Act provides that,

“20.— Rectification.”

(1) If a court is satisfied that a will is so expressed that it fails to carry out the testator's intentions, in consequence—

- (a) of a clerical error; or
- (b) of a failure to understand his instructions,

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

(2) An application for an order under this section shall not, except with the permission of the court, be made after the end of the period of six months from the date on which representation with respect to the estate of the deceased is first taken out.

(3) The provisions of this section shall not render the personal representatives of a deceased person liable for having distributed any part of the estate of the deceased, after the end of the period of six months from the date on which representation with respect to the estate of the deceased is first taken out, on the ground that they ought to have taken into account the possibility that the court might permit the making of an application for an order under this section after the end of that period; but this subsection shall not prejudice any power to recover, by reason of the making of an order under this section, any part of the estate so distributed.

(4) The following are to be left out of account when considering for the purposes of this section when representation with respect to the estate of a deceased person was first taken out—

(a) a grant limited to settled land or to trust property,

(b) any other grant that does not permit any of the estate to be distributed,

(c) a grant limited to real estate or to personal estate, unless a grant limited to the remainder of the estate has previously been made or is made at the same time,

(d) a grant, or its equivalent, made outside the United Kingdom (but see subsection (5)).

(5) A grant sealed under section 2 of the Colonial Probates Act 1892 counts as a grant made in the United Kingdom for the purposes of subsection (4), but is to be taken as dated on the date of sealing.”

26. In Marley v Rawlings [2014] UKSC 2 the solicitor acting for the claimant’s parents had drafted mirror wills providing that each parent left the other his or her entire estate and if the other had predeceased them or did not survive for more than a month the estate passed to the claimant. The solicitor made a mistake during the execution process and each parent signed the wrong will. The mistake was only discovered on the death of the second parent. The claimant, who was an adoptive child, brought a claim under section 20 of the 1982 Act and sought a grant of probate in solemn form. The two natural children of the parents defended the claim. The Supreme Court adopted a wide interpretation to the meaning of “a clerical error” and held that a clerical error has arisen when the solicitor handed the wrong will to each parent to sign.

27. Lord Neuberger at paragraphs 75 to 76 said,

“75. I accept that the expression “clerical error” can have a narrow meaning, which would be limited to mistakes involved in copying or writing out a document, and would not include a mistake of the type that occurred in this case. However, the expression is not one with a precise or well-established, let alone a technical, meaning. The expression also can carry a wider meaning, namely a mistake arising out of office work of a relatively routine nature, such as preparing, filing, sending, organising the execution of, a document (save, possibly, to the extent that the activity involves some special expertise). Those are activities which are properly be described as “clerical”, and a mistake in connection with those activities, such as wrongly

filing a document or putting the wrong document in an envelope, can properly be called “a clerical error”.

76. For present purposes, of course, “clerical error” is an expression which has to be interpreted in its context, and, in particular on the assumption that section 20 is intended to represent a rational and coherent basis for rectifying wills. While I appreciate that there is an argument for saying that it does nothing to discourage carelessness, it seems to me that the expression “clerical error” in section 20(1)(a) should be given a wide, rather than a narrow, meaning.

28. Lord Neuberger went on to analyse why there were sound public policy reasons for interpreting the term “clerical error” widely. At paragraph 79 he said,

“ ... sections 17 to 21 of the 1982 Act are, as I see it, all aimed at making the law on wills more flexible and rendering it easier to validate or “save” a will than previously. Section 17, which re-enacts section 9 [of the Wills Act 1837], is concerned with the “relaxation” of formalities ... ; sections 18 and 19 introduce greater flexibility in relation to the effect of the testator's marriage and death of his issue; section 20 introduces rectification for the first time for wills, and section 21 permits the testator's subjective intention to be taken into account for the first time. The whole thrust of the provisions is therefore in favour of a broad interpretation of a provision such as section 20(1)(a).”

Jurisdiction of the court

29. Mr Bowmer, counsel for Vincent, has referred me to Dicey, Morris & Collins on the Conflict of Laws, 15th edition, and specifically,

“Rule 146

The High Court has jurisdiction to determine the succession to the property of any person if, but only if, there is a properly constituted representative of the estate before the court.

Rule 154

The material or essential validity of a will of movables or of any particular gift of movables contained therein is governed by the law of the testator's domicile at the time of his death.

Rule 155

The material or essential validity of a will of immovables or of any particular gift of immovables contained therein is governed by the law of the country where the immovables are situated (lex situs).

Rule 156

A will is to be interpreted in accordance with the law intended by the testator. In the absence of indications to the contrary, this is presumed to be the law of his domicile at the time when the will is made.”

30. Mr Lewison, counsel for Vincent B, takes issue with the relevance of these rules. He submits that section 77 of the 1982 Act deals with the territorial extent of the 1982 Act and that sections 17 to 22 extends to England and Wales only. He relies on Bennion on Statutory Interpretation, 7th edition, specifically paragraphs 4.6 and 4.8 which draws the distinction between the extent of an Act, the territory in which an Act is law, and its application “which is what it applies to.”¹ He submits that an English court cannot rectify a foreign Will.

Section 20(2)

31. Mr Lewison specifically referred me to Chittock v Stevens [2000] WTLR 643 in which David Donaldson QC sitting as a deputy High Court Judge sought to align the guidelines in applications under section 4 of the Inheritance (Provision for Family and Dependants) Act 1975 (“the 1975 Act”) with applications under section 20(2) of the 1982 Act. The Judge cited the decision of Sir Robert Megarry Vice-Chancellor In re Salmon [1981] Ch 167 and the guidelines set out in pages 174 to 177.
32. These are helpfully summarised by Black LJ, as she then was, in Berger v Berger [2013] EWCA Civ 1305 at paragraph 44,

“(1) The court's discretion is unfettered but must be exercised judicially in accordance with what is right and proper.

(2) The onus is on the Applicant to show sufficient grounds for the granting of permission to apply out of time.

(3) The court must consider whether the Applicant has acted promptly and the circumstances in which she applied for an extension of time after the expiry of the time limit.

(4) Were negotiations begun within the time limit?

(5) Has the estate been distributed before the claim was notified to the Defendants?

¹ Paragraph 32 of his skeleton argument.

(6) Would dismissal of the claim leave the Applicant without recourse to other remedies?

(7) Looking at the position as it is now, has the Applicant an arguable case under the Inheritance Act if I allowed the application to proceed?"

33. However the Judge in Chittock also, rightly in my view, went on to offer a cautious note,

“The guidelines in re Salmon do not refer to strength of case beyond the threshold level of arguability or suggest that it is a relevant matter to be taken into account in a claim for provision out of the estate under the 1975 Act and that may well be the correct position, though the point is not addressed in re Salmon. However, even if it is correct in relation to an application under the 1975 Act, the position may well be different in relation to a claim for rectification under the 1982 Act. While a claim under the 1975 Act for provision out of the estate is one to overrule or derogate from the testator's intentions a claim for rectification is concerned to ensure the proper implementation of his wishes.”

34. I consider it right to be cautious. To simply align the guidelines from applications under section 4 of the 1975 Act to applications to extend time under section 20(2) of the 1982 Act is to disregard the fundamentally different nature of these claims. The former can effectively drive a coach and horses through testamentary intention whereas the latter seeks to find the true testamentary intention and give effect to it by rectifying the will. Whilst noting that section 20(3) of the 1982 Act is analogous to section 20 of the 1975 Act I do consider that section 20 of the 1982 Act is and should be more flexible than the 1975 Act. That is demonstrated in the more flexible approach to the meaning of section 20(1)(a) of the 1982 Act as set out by the Supreme Court in Marley v Rawlings. Theobald on Wills, 18th edition, paragraph 14-010 also makes the additional point that there are practical reasons for the flexibility. A rectification claim is often an alternative to a claim for a declaration as to the true meaning of a will. The latter has no time constraints and significantly no protection for the executor. There is a potential risk that if there was too restrictive approach to the time limit under section 20 of the 1982 Act a court may, in trying to achieve a result where the will truly reflected the testamentary intentions, strain too far in interpretation. That could lead to an executor being exposed many years later for distributing on the wrong basis.

35. Mr Lewison also cited my case of Re Hendry Deceased [2019] EWHC 1976 (Ch) in which I refused to extend time under section 4 of the 1975 Act and Re Bhusate [2019] EWHC 470 (Ch) where Chief Master Marsh granted permission after a delay of over 25 years. All these cases do is to illustrate how fact sensitive and finely balanced these decisions are, a point candidly acknowledged by Mr Lewison.

36. In Cowan v Foreman [2019] EWCA Civ 1336 the first instance judge had sought to apply a restrictive guillotine to the time limit under section 4 of the 1975 Act. Asplin LJ at paragraphs 43 and 50 took the view that the judge's approach had been to focus

on whether there was a good reason for the delay and whether there was an arguable case which led him into error by adopting a disciplinary view to the question of whether time should be extended. At paragraphs 44 to 46 she said,

“44. First, it seems to me that the concept of a "stale claim" is of little relevance in the 1975 Act context. It is borrowed from and is more apposite to the consideration of matters under the Limitation Act 1980. Section 4 contains no long stop provision. Furthermore, the assessment, for the purposes of the substantive claim, is made at the date of the hearing and, therefore, concerns about the loss of evidence and witnesses over time are of much less importance than they might be. As Briggs J (as he then was) pointed out in *Nesheim v Kosa*, section 4 exists for the purpose of avoiding unnecessary delay in the administration of estates which would be caused by the tardy bringing of proceedings and to avoid the complications which might arise if distributions from the estate are made before the proceedings are brought. This dovetails with section 20 of the 1975 Act. It provides express protection for the executors/personal representatives of an estate from any liability which might otherwise arise as a result of having made a distribution from the estate more than six months after the grant of probate/letters of administration, on the ground that they ought to have taken into account that the Court might permit a claim to be made after the end of that period. Section 4 is not designed, therefore, to protect the court from stale claims as the Judge explains. On the contrary, if the circumstances warrant it, the power in section 4 can be exercised in order to further the overriding objective of bringing such claims before the court where it is just to do so, and, in such circumstances, the personal representatives have the protection afforded by section 20. The power must be considered in the context in which it arises.

45. Secondly, it follows that I do not agree with the Judge that what he describes as "a robust application of the extension power" is necessary. There is nothing in section 4 or in the principles distilled in *Berger v Berger* which requires such an approach to be adopted. ...

46. Thirdly, it seems to me that the Judge's references to the "ever-developing sanctions jurisprudence exemplified in *Denton* ..." and the fact that "the time limit is contained within the statute rather than in a procedural rule" are for the most part inapposite. There is no disciplinary element to section 4. Unlike the provisions of the CPR, the six-month time limit in section 4 is not to be enforced for its own sake. The time limit is expressly made subject to permission of the court to bring an application after the six months has elapsed. It is designed to bring a measure of certainty for personal representatives and

beneficiaries alike. When determining whether a claim should be brought outside the six-month period, nevertheless, the court must consider all of the relevant circumstances of the case in question and the factors which were highlighted in *Berger v Berger*.”

37. Mr Bowmer submitted that Cowan v Foreman gave important guidance as to the nature of the six-month time limit, albeit in section 4 of the 1975 Act, and the correct approach of the court to that time-limit. I agree with that submission and also considered that there is a clear argument to take a more flexible, but still principled, approach to applications under section 20 of the 1982 Act.

THE CLAIM FOR RECTIFICATION

38. There are three primary issues that arise in this claim:
- (1) is there a clerical error in the 2010 will for the purposes of section 20(1)(a) of the 1982 Act;
 - (2) what was the deceased’s domicile at the date of his death;
 - (3) should the court grant permission to bring the claim under section 20(2) of the 1982 Act.
39. Mr Bowmer also raised whether section 21 of the 1982 Act could be used to interpret the 2010 will in the way contended for by Vincent. Extrinsic evidence may be used, including evidence of the testator’s intention, to aid interpretation. However that only arises if section 21(1)(a) to (c) are engaged. Vincent would need to show that a part of the 2010 will was meaningless, it was ambiguous on its face or other evidence (but not that of the testator’s intention) shows that the language is ambiguous.
40. As Mr Bowmer accepts he can demonstrate that an ambiguity arises but only by reference to the testator’s intention and therefore he cannot directly rely on section 21.
41. Mr Bowmer also went on to develop an argument that the court retains a common law power of rectification. In Marley v Rawlings Lord Neuberger at paragraph 28 said, albeit obiter,

“28. As at present advised, I would none the less have been minded to hold that it was, as a matter of common law, open to a judge to rectify a will in the same way as any other document: no convincing reason for the absence of such a power has been advanced. However, it is unnecessary to consider that point further, as Parliament has legislated on the topic, in section 20 of the 1982 Act (“ section 20 ”).”

42. Although at paragraph 30 he said,

“30. Mr Ham QC, for the appellant, realistically accepted that it would be inappropriate for the court to hold that it had wider

powers to rectify a will than those which were conferred by section 20 . Given that Parliament decided to confer a limited power of rectification at a time when there was clear authority that the court had no inherent power to rectify, it would be wrong for any court to hold, at least in the absence of a compelling reason, that it actually had an inherent power which was wider than that which the legislature conferred.”

43. This common law power had been recognised earlier in the Law Reform Committee Nineteenth Report Interpretation of Wills, May 1973. The committee at paragraph 9 accepted that the equitable doctrine of rectification does not apply to wills but went on to comment that,

“... under the law of probate, and again under the rules of construction, the court has certain powers which may be regarded as in effect amounting to a limited jurisdiction to rectify... However, they are so restricted in their ambit, and so partial in their operation, that they cannot be regarded as providing any real substitute for the equitable doctrine.”

44. At paragraphs 11 and 12 the committee went on to consider these powers.

“11. ... there are two categories in which the court in effect has a very limited power to alter the words which appear in a will. First, in admitting a will to probate (as distinct from construing a will which has been proved) the court may exclude from the wheel any part which was inserted by fraud, or which for some other reason was inserted without the testator’s knowledge and approval; and the same applies to any words which have been included by inadvertence or by Mrs understanding if their omission will give effect to the true intention of the testator as found by the court. This power is strictly limited to the omission of words for: there is no power of altering or adding any words. ...

12. Second, as part of the process of construing a will the court sometimes reads it as if certain words had been omitted, changed or inserted. This will be done only if two conditions are satisfied. First, the court must be left in no doubt not only that the words appearing in the will do not represent the testator’s intention but also as to precisely what omission, substitution or insertion is to be made to carry out that intention. Second, the requisite certainty must be derived from the language of the will itself for: extrinsic evidence does not appear to be admissible for this purpose. ”

45. As to the first category the footnote in the report refers to the case of Re Morris decd [1971] P 62. The testatrix made provision in clause 3 of her will for her housekeeper and left a number of pecuniary legacies by clause 7 including in clause 7(iv) for her

housekeeper. Shortly after execution of the will the testatrix instructed her solicitor that she wanted to alter the bequest to her housekeeper but otherwise leave the will intact. The solicitor prepared a codicil which should have read, I revoke clauses 3 and 7(iv) of my will, but instead revoked clauses 3 and 7. The codicil was executed. The solicitor admitted his mistake and said he believed that the testatrix had merely glanced at the codicil assuming that it gave effect to her intentions. Latey J held that the absence of the numeral “iv” was a mere slip or clerical error and that the testatrix was not bound by it. The court could not add “iv” so the best course was to admit the codicil to probate with the omission of the numeral 7, leaving the court of construction to interpret the blank which remained after the word “and”.

46. The first category appears to recognise that there is a power to interfere with the text of a will, albeit by deletion not insertion. The second category has a very limited remit reliant on a process of construction from the will itself.
47. The claim form squarely brings the claim under section 20 of the 1982 Act and no application has been made to amend the claim form. I consider that it would have been open to Vincent on the first category identified by the committee to argue that the 2010 will could have been rectified, in the common law sense, by the removal of the words “in equal shares absolutely”. That would have led to an ambiguity and as a matter of construction the court could have admitted evidence of the deceased’s testamentary intentions to cure this ambiguity. The claim form sought “such further or other relief as the court thinks fit” and Mr Bowmer submitted that if I refused the claim for rectification under section 20 of the 1982 Act I could grant relief via this somewhat more circuitous route: I agree.

(1) Is there a clerical error in the 2010 will for the purposes of section 20(1)(a) of the 1982 Act ?

48. The deceased’s testamentary intentions are set out in the handwritten note made by Cyril Osborne at the meeting on 5 July 2010. David Osborne has been able to confirm in his witness statement that this note is in the handwriting of his late father, Cyril Osborne. He also confirms that it is his father’s signature on the 2010 will. Moreover Brona Osborne who was employed as a secretary by her father, Cyril Osborne, in her witness statement also confirms that her father had written the attendance note and probably followed his usual practice of typing up his own attendance notes. She also recalls her father dictating the terms of the 2010 will to her, that she typed it up, it was printed off and the deceased executed the will. Her signature is also on the 2010 will. She does not give any explanation as to why she has a clear recollection of this meeting but it does not matter and it is not disputed by Fergus or Vincent B.
49. I am satisfied that the handwritten attendance note headed “attendance docket” dated 5 July 2010 is a contemporaneous record made by Cyril Osborne during a meeting with the deceased when he gave instructions to prepare a new will. I also accept that the typed up document headed “memo” is a document typed up by Cyril Osborne and is an accurate and more legible record of the meeting on 5 July 2010.
50. The deceased wished to divide the residue of his estate into six equal shares and divide those between Eileen, Kathleen, Michael, Vincent, John and the last one-sixth was to be divided equally between his late sister Maureen’s five children. His testamentary intentions were clear.

51. Unfortunately there was a clerical error when the 2010 will was typed up. It should have recorded that the residue was to be divided into six equal shares and then identify the beneficiaries to whom those shares were to be divided. Instead the 2010 will simply listed all 10 of the beneficiaries and then added “in equal shares absolutely”. The effect of that was to divide the residue into 10 shares and not six. I do not know whether the error occurred in Cyril Osborne’s dictation of the will instructions to Brona Osborne or as she typed up the will. It is plain that a mistake arose that was not corrected when the 2010 will was executed. I accept Mr Bowmer’s submission that this was a clear clerical error arising out of office work and that it is a strong case for rectification of the 2010 will.
52. The effect of this error, if not rectified, is that the five defendants will receive an unintended windfall from the deceased’s estate. At present the residue, I am told, has a value of £1,004,623.80 so that the 10 listed beneficiaries would each receive £100,462.38. If the 2010 Will is rectified so that it truly reflects the deceased’s testamentary intentions the residue would be divided into six shares amounting to £167,436. Splitting one share by five between the defendants would mean that they each received the sum of £33,487.
53. Mr Bowmer submits that the 2010 will could be rectified as follows:

“ALL THE REST RESIDUE AND REMAINDER of my property of every nature and kind both real and personal that I may die possessed of and where so ever situate including any assets which I might hold in the United Kingdom shall be divided into six equal shares and I GIVE DEVISE AND BEQUEATH one such share to my sister, Eileen Delaney, one such share to my sister in law, Kathleen Kelly (wife of my deceased brother, James Kelly) and one such share to each of my brothers, Michael Kelly, John Kelly and Vincent Kelly, and one such share to be divided equally between my niece Mary Brennan and my nephews, Matthew, Fergus, Vincent and Damien Brennan (the children of my deceased sister, Maureen Brennan) ~~in equal shares absolutely~~ subject only to the payment of my debts, funeral and testamentary expenses. ”

54. I accept that this wording would rectify the 2010 will so that it reflects the deceased’s testamentary intentions.

(2) *What was the deceased’s domicile at the date of his death?*

55. The deceased’s domicile of origin was the Republic of Ireland. However a person may acquire a domicile of choice and this is encapsulated in Rule 10 in Dicey,

"Every independent person can acquire a domicile of choice by the combination of residence and intention of permanent or indefinite residence but not otherwise."

56. The evidence, which is not disputed by Fergus or Vincent B, is that in the early 1970's the deceased moved to England. He remained living in England for the next 44 years until his death. Vincent's evidence, which I accept, is that he intended to live in England indefinitely and had no intention to return to Ireland. That analysis is supported by the following factual evidence: the deceased lived in England from 1976 to 2014 when he died; he purchased the flat in 2009 and it was his home; the vast bulk of his assets were in England; he only visited Ireland occasionally and stayed with family when he did so; his social life was in London and he regarded London as his home; he sold the family house in Ireland in 2010 only retaining some family land with an uninhabitable cottage; he worked in England until 1992 and remained living in London post retirement until his death.
57. I consider that the deceased was domiciled in England when he died and that he was also domiciled in England when he gave will instructions in 2006. There is no evidence that he abandoned his domicile of choice. Therefore he was also domiciled in England when he gave will instructions in 2010 that led to the drawing up and execution of the 2010 will. I place no weight on the fact that those wills gave addresses in Ireland when the overwhelming factual evidence is that the deceased had settled in London indefinitely.
58. Domicile is relevant in order to determine which law is to be applied to the issues concerning the 2010 will. However rectification does not easily sit within any of the rules in Dicey that Mr Bowmer has referred me to. As a grant of representation has been made in England the High Court has jurisdiction to determine the succession to the property of the deceased, rule 146.
59. The material or essential validity of a will of movables is governed by the law of the testator's domicile at the date of his death, rule 154. Here the deceased was domiciled in England. The notes to this rule in Dicey at paragraph 27-045 state that even though a will may be formally valid it could nevertheless be invalid or inoperative if it contains provisions to which the law will not give effect. "Such invalidity, arising from the nature of the bequest, is termed material or essential invalidity, and whether a will is or is not void wholly or in part on account of such invalidity depends upon the law of the country where the testator is domiciled at the date of his death." Mr Bowmer sought to give various examples which demonstrated that the domicile of the deceased was relevant to the applicable law. For example, a claim under the 1975 Act is limited to cases where the deceased died domiciled in England. Under section 15 of the Wills Act 1837 a gift to a beneficiary who is an attesting witness would be void and applied to a will where the testator is domiciled in England. Under rule 155 it is the *lex situs* which governs the material or essential validity of a will of immovables.
60. Rule 156 provides that a will is to be interpreted in accordance with the law intended by the testator and absent any indication to the contrary it will be presumed to be the law of his domicile when the will was executed; this applies to movables and immovables. Save for the reference to an address in Ireland which the deceased did not live at there is nothing in the 2010 will other than the fact it was made and executed in Ireland to suggest that the deceased intended Irish law to apply. In Re Cunningham [1924] 1 Ch 68 a testator who was domiciled in France made a will in England leaving certain legacies to domestic servants and then dividing the residue between 10 named legatees. He died in France and his will was proved in England. Two of the residual legatees died during the testator's lifetime but without issue. Eve

J held that French law applied, there being no contrary intention in the will. Under French law there was no lapse so the 8 residuary legatees took the whole of the residuary estate.

61. I was taken at length through various provisions in Dicey and the corresponding provisions in Theobald but what is striking is that there is no specific treatment of rectification. In terms of the best fit I consider that rectification is more obviously analogous to the examples given in respect of essential validity. This applies whether it is the residual common law power of rectification, where words can only be deleted from a will, or rectification under section 20 of the 1982 Act when words can be read into the will. Therefore save for the land in Ireland which is unaffected by the claim to rectification the issue in respect of the 2010 will is to be determined in accordance with English law.
62. If my analysis is wrong then I consider that the law of the deceased's domicile on 5 July 2010, which was England, applies to rectification as it does to interpretation of the 2010 will. Where it is relevant section 49 of the Administration of Estates Act 1925 applies to any partial intestacy in respect of the 2010 will but where any of the deceased's named siblings in the 2010 will predeceased him leaving issue section 33 of the Wills Act 1837 applies so that the issue shall take in place of their parent. These are examples, about which there is no dispute between the parties, of English statutory law applying to the 2010 will and there is no logical reason why section 20 of the 1982 Act should not also apply.
63. Despite Mr Lewison's detailed submissions it is difficult to see why English law should not be applied to this claim. As Bennion states at the notes to section 4.1, page 110, "issues to do with the people, places and things in relation to which an act applies on matters of application, not extent, and are dealt with separately". Under section 4.6, "To a limited extent cases with a "foreign" element are dealt with by rules of private international law." Here the 2010 will has been admitted to probate in order to give effect to the deceased's testamentary intention. I am concerned with the application of the 1982 Act to the administration of the estate in England. This is also consistent with wider principles of private international law and the autonomy of the deceased in selecting England as his country of domicile. It therefore makes sense for the law of the deceased's domicile to determine issues of essential validity and construction, in respect of movables, including this claim for rectification. Mr Bowmer tested this by submitting, by reference to a hypothetical example, that it should make no difference to which law to apply whether the error was naming 10 beneficiaries in the will when the note of the testator's will instructions named 9 or the error was the other way round. In the former example the reference to the tenth beneficiary would be omitted as a matter of essential validity or construction. The latter example could only be corrected by rectification and adding the tenth beneficiary's name to the will. I agree that there would be no sense to draw a distinction between these examples when the court's power to rectify is so closely intertwined with construction.
64. The English law on rectification whether under section 20 of the 1982 Act or the common law power to rectify applies to the 2010 will.

3) *Should the court grant permission to bring the claim under section 20(2) of the 1982 Act?*

65. The relevant considerations are as follows:

(1) the burden is on Vincent to show sufficient grounds for bringing this claim after expiry of six months from the date of the grant of probate;

(2) has Vincent acted promptly and what are the circumstances in which he has applied for permission under section 20(2)?

(3) were negotiations begun within the time limit?

(4) has this deceased's estate been distributed before the claim was notified to the defendants?

(5) would refusal to grant permission leave Vincent without recourse to other remedies?

(6) does Vincent have an arguable case under section 20(1) of the 1982 Act?

66. The issue with the will was discovered within six weeks of the death of the deceased. On 7 November 2014 probate was granted to Vincent, the six months period expired on 7 May 2015 but the claim was not issued until 1 May 2018, nearly 3 years later. Mr Bowmer referred me to the case of Gerling v Gerling [2010] EWHC 3661 (Ch) in which there had been a delay of five years between the grant of probate and the issuing of the claim. That is simply an illustration of a case dependent on its own facts and offers no obvious additional guidance in this case. Indeed the criticism I made of referring me to cases under the 1975 Act with differing lengths of time that were acceptable or not acceptable to the court applies with equal force here.

67. Mr Bowmer in an extremely thorough analysis went through the chronology of what had happened between the death of the deceased and the claim being issued, principally by reference to the correspondence. He divided the chronology for ease of reference into three separate time periods: June 2014 to May 2016; 31 May 2016 to 17 November 2017; and 17 November 2017 to 1 May 2018. Although it was not strictly necessary it was extremely helpful.

68. What the correspondence demonstrates is that Vincent had quite properly instructed RAO in Ireland and HPW in England to act on behalf of the estate. The defendants instructed ODW in about November 2014. By letter dated 15 January 2015 ODW asked RAO confirm that the estate be distributed in accordance with the 2010 will, each named beneficiary receiving a one-tenth share. The response by letter dated 27 February 2015 made the estate's position clear the defendants' share should be one-sixth, "it would certainly be ludicrous to suggest that it was the intention of the above deceased to leave the same share to his nephews and niece as that of his own siblings." Following further correspondence a draft deed of variation was sent to ODW under cover of a letter dated 13 November 2015. In a letter dated 8 December 2015 ODW confirmed that the defendants "would be prepared to let the property pass subject to the following conditions". Those conditions concerned covering the cost of their legal advice and the level of fees and outgoings which Vincent proposed to deduct as expenses from the estate. The letter concluded that once those matters were

addressed they believed they would be in a position to have the deed of variation signed. In order to resolve the issue in a letter dated 18 January 2016 from HPW to ODW Vincent offered to reduce the amount that he was claiming and invited the defendants to indicate the amount reduction that they would consider to be sufficient. After chasing and an offer made by HPW there was a volte face by the defendants in ODW's letter dated 19 February 2016, "we believe that the appropriate action now is for the executor to make an application to court to have the will construed in accordance with English law." Despite further correspondence it was clear by May 2016 that negotiations had broken down.

69. Mr Lewison is critical of the lack of promptness on the part of Vincent. He submits that an opinion was obtained from Irish counsel on 29 July 2014 and from English counsel on 8 April 2015. The latter advised that this was a very strong case for rectification but only if the will was an English will and that it might not be available because the will was an Irish will. Vincent B in his statement criticises the lack of transparency by the estate's solicitors, disclosing only the second opinion, that of the English counsel. I do not follow how the technical area of conflicts of law can be deployed to criticise the actions of Vincent. What this serves to demonstrate is that it was by no means straightforward at that stage what action Vincent in his capacity as executor should take.
70. Vincent in his first witness statement says that he felt, as executor, that in the absence of agreement he had no choice but to accept the 2010 will as drafted. The family were unhappy about not giving effect to the deceased's testamentary intentions. Vincent, his two surviving siblings and the children of John instructed Parte & Associates ("Parte") to bring a claim against RAO. Catherine Carey, one of the children of Kathleen, instructed Coughlan White & Partners to bring a claim against RAO. It is clear having failed to achieve an agreement with the defendants, that Vincent and other family members turned their attention to bringing a claim in negligence against RAO. On 17 June 2016 a claim was issued against RAO and a statement of claim delivered on 4 January 2017. On 19 April 2017 Beale acting on behalf of RAO wrote to Parte saying that they had obtained an opinion from English counsel who advised that it was possible to make an application under section 20 of the 1982 Act to rectify the 2010 will. That led to the decision in November 2017 to pursue the rectification claim in England.
71. Whilst it is correct that in a letter dated 31 May 2016 HPW said that the deceased's estate would be distributed in accordance with the 2010 will they subsequently said that could not take place until the assets in Ireland were received; they were not received until April 2017. Even at that stage the estate was not distributed because Beale and Parte were in correspondence as to the possibility of a rectification claim being pursued and more specifically whether the estate was under an obligation to pursue it; a Walker v Medlicott [1999] 1 WLR 727 (CA) point. On 19 May 2017 HPW wrote to ODW stating that the solicitors who represented RAO had raised an issue that must be considered before distribution. By letter dated 17 November 2017 ODW were notified that there would be a will construction claim in England. I also note that the statement as to distribution was made by HPW on behalf of the estate and that it was not made by the beneficiaries under the 2010 will.
72. The third phase of the chronology comprises detailed correspondence from Beale to family members, including the defendants through ODW. Quite properly they sought

the consent of the beneficiaries to the claim. I have set out events after issue of the claim in paragraphs 5 to 7 above.

73. Mr Lewison submits that a substantial part of the delay is on explained, in particular there is a crucial period between May 2017 and May 2018 about which Vincent gives no proper evidence or explanation. He considers it significant that there was no standstill agreement entered into. As to the latter that is simply one of the circumstances of the case that I can take into account. There were lengthy negotiations with the defendants which started around the time that probate was granted and continued until May 2016. Vincent then turned his attention, with other family members, to bringing a professional negligence claim against RAO. It was only in April 2017 that Vincent appreciated that he could bring a rectification claim in respect of the 2010 will and that he could do so as beneficiary. I accept Vincent's evidence that between May 2017 and November 2017 this claim was being evaluated and issues surrounding the funding for this claim were being resolved. However I do consider that the correspondence with ODW should have been more frank, less opaque and there is no explanation for the hiatus of six months before ODW were told that a will construction claim would be brought, albeit that it was a rectification claim. Whilst there is a danger of looking back at the correspondence and steps taken with the benefit of hindsight the solicitors should have explained the position to ODW at a much earlier stage and more fully. When Mr Lewison submits that the defendants were kept in the dark about the case I agree: there is no obvious reason for doing so.
74. On balance I am satisfied that Vincent has provided a clear explanation as to the steps that were being taken during each of the three phases of the chronology. I accept Mr Bowmer's submission that Vincent was not fully aware of his right to make this claim until April or May 2017 . I remind myself that Vincent does not need to have a good reason for every period of the delay.
75. The estate has not yet been distributed: I consider that to be an important factor. In Pengelly v Pengelly [2008] Ch 325 Judge Hodge QC granted rectification under section 20 of the 1982 Act where the will failed to carry out the testator's intentions which had been to create an immediate discretionary trust of its subject matter and instead provided for discretionary trust to be created by a deed to be executed by the trustees with adverse fiscal consequences. At paragraph 13 the judge emphasised that "the six-month time limit has been imposed principally in order to enable personal representatives to distribute an estate thereafter without having to worry about possible rectification claims." The judge placed some weight on the fact that the estate had not been distributed and no-one would be prejudiced by an extension of time. This point was also emphasised in the earlier case of McNulty v McNulty [2002] EWHC 123 (Ch) where Lancelot Henderson QC considered that on the facts of that case the most significant considerations were the non-distribution of the estate and the absence of any prejudice. At paragraph 92 he said,
- "I agree with Mr Mann that the time limit should not be regarded as a disciplinary provision which should be enforced for its own sake, and that its main purpose is to provide a measure of protection to personal representatives, and a measure of certainty to beneficiaries by enabling the estate to be distributed once the six- month period has elapsed."

76. Mr Lewison argued that the estate is only undistributed in the sense that “the beneficiaries do not have the cash in their own hands”. He submits the estate is fully administered and the accounts were settled by 11 April 2017. On that analysis the defendants had an expectation to receive their inheritance between a date shortly after 11 April 2017 and the receipt of the letter dated 19 May 2017 when it was stated there could be no distribution until other matters had been explored with RAO’s solicitors. I do not agree that the overly technical way in which Mr Lewison approaches this issue is correct in principle or as a matter of policy. The executors and beneficiaries need certainty and that is why there is a time limit in place under section 20 of the 1982 Act but there is also a power to extend time to bring a rectification claim under section 20(2). Here there has been no distribution and therefore there is no need to recoup any monies from the defendants. The factors identified in Re Salmon and as summarised in Berger v Berger do not equate an expectation of receiving a distribution of the estate with an actual distribution of the estate. The former and any change of position arising therefrom are specifically dealt with under the consideration of prejudice.
77. Insofar as it is argued by Fergus and on behalf of Vincent B that they have suffered prejudice I do not accept that this is an overwhelming factor in this case. Mr Lewison conceded on behalf of Vincent B that there is “some evidence there” but “it is not as full as might have been hoped.” Initially the defendants were prepared to agree to receiving a one-sixth share of the deceased’s estate albeit on condition that Vincent did not recover the full extent of his expenses from the estate and that they were identified for legal costs. Whilst they were told in May 2016 that there would be a distribution in accordance with the 2010 will, they were also aware that no distribution would take place until the assets in Ireland had been got in; that took place in April 2017. However by 19 May 2017 the defendants were notified albeit with scant information that there would be no distribution until a point raised by Beale had been considered. When Vincent B in his statement says that he has suffered prejudice he goes on to assert that he has had to postpone decisions regarding employment, retirement “and advancement of my family” because he is not received his inheritance. No details are given and that prejudice could be said to apply to whether he received one-tenth of the estate or a share of one-sixth of the estate. Fergus offers even less information in his statement asserting that the delay has caused him “considerable hardship and I have to survive on a very modest fixed income”. He also suggests that any claim that he might have against RAO would be adversely affected if permission were granted. I simply do not understand this point. There is no evidence or suggestion by either Fergus or Vincent B that they have taken on debt or that they have changed their positions. At most their evidence amounts to frustration in not receiving an inheritance from the deceased’s estate, yet.
78. The rectification claim is a strong one, indeed it is difficult to see how it could be resisted on the merits. There was an obvious clerical error so that the 2010 will does not reflect the deceased’s testamentary intentions that are unequivocally recorded in Cyril Osborne’s attendance notes.
79. Mr Lewison argues that the rectification claim would be barred by acquiescence because the estate accounts had been settled and it was stated by HPW the estate would be distributed in accordance with the 2010 will. There is no evidence before me that Vincent (as beneficiary or executor) and the other beneficiaries under the

2010 will knew about the extent of their rights, certainly in Vincent's case not until April or May 2017. How then can Vincent or indeed any of the other beneficiaries have been said to acquiesce so that any equitable claim would be barred? In order for Mr Lewison to make good this argument he must demonstrate that Vincent had full knowledge of the facts, and possibly also their legal consequences. He had taken advice as an executor and that advice was that a claim could not be brought for rectification because the will was Irish: which was wrong. It is difficult to see how his concurrence as executor to a distribution, based on a false premise, can bar his claim as beneficiary.

80. Vincent does have an alternative remedy and Parte have issued a professional negligence claim on behalf of him and certain family members against RAO. Mr Lewison reminds me that Vincent and the other beneficiaries had reached the stage of seeking judgment in default. No judgment has been entered though and whilst breach may well be clear there are obvious arguments about whether Vincent and the other beneficiaries have mitigated their loss properly. Obtaining judgment in full for the losses potentially incurred by them is not necessarily straightforward. However that is only one factor and not the determinative one that I have to consider.
81. If I stand back and ask whether it is just and proper in all the circumstances of this case to extend time for making this claim the answer is an undoubted yes. Negotiations were initiated around the time that probate was granted, Vincent has set out an explanation for the delay in issuing this claim, there has been no distribution of the estate, other than assertion no evidence of prejudice other than a delay in distribution has been advanced either by Fergus or Vincent B, this is an extremely strong rectification claim and the existence of an alternative remedy does not tilt the balance against granting permission. Those factors warrant the grant of permission under section 20(2) of the 1982 Act. I also consider that there should be a more flexible approach in claims under section 20 as opposed claims under section 4 of the 1975 Act. However the factors are so strong in this case that I have not needed this extra flexibility.
82. I therefore grant permission under section 20(2) of the 1982 Act to bring this claim and grant Vincent rectification of the 2010 will in the terms sought.