



Neutral Citation Number: [2022] EWHC 359 (Ch)

Case No: PT-2020-BRS-000089

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS**  
**PROPERTY, TRUSTS AND PROBATE LIST**  
**IN THE ESTATE OF ALAN GEORGE BRACEY DECEASED**

Bristol Civil Justice Centre  
2 Redcliff Street, BS1 6GR

Date: Monday 21 February 2022

**Before :**

**PHILIP MOTT QC**  
**Sitting as a Deputy High Court Judge**

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**Between :**

<b>ALAN GEOFFREY BRACEY</b>	<b><u>Claimant</u></b>
<b>- and -</b>	
<b>(1) PAMELA CAROL CURLEY</b>	
<b>(2) MAUREEN BARBARA HASTINGS</b>	
<b>(as executrix of the last Will of Alan George Bracey)</b>	<b><u>Defendants</u></b>

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**Steven Ball** (instructed by **Burges Salmon LLP**) for the **Claimant**  
**Joss Knight** (instructed by **John Hodge Solicitors**) for the **First Defendant**  
**Thomas Entwistle** (instructed by **Humphreys & Co**) for the **Second Defendant**

Hearing dates: 8 & 9 February 2022  
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**Approved Judgment**

**Philip Mott QC :**

1. Alan George Bracey (“the Testator”) died on 27 May 2018. Probate was granted to the Second Defendant on 16 March 2020 in relation to his Will dated 31 July 2015 (the Will”). This action involves a dispute between his son, the Claimant, and his daughter, the First Defendant, about that Will. The Second Defendant has been represented at trial, but takes a neutral position.
2. Although there were early challenges, it is now accepted that the Will was validly executed, and that the Testator had testamentary capacity and knowledge and approval of the contents of the Will at the relevant times.
3. The issues relate to (a) the proper construction of Clause 5 of the Will using general common law principles; (b) whether section 21 of the Administration of Justice Act 1982 (“the 1982 Act”) applies, so as to allow evidence of the Testator’s intentions, and if so how does that affect its interpretation; and (c) whether the Will can and should be rectified under the provisions of section 20 of the 1982 Act.

*Background*

4. The Testator was married to Irene Bracey. They had two children, Pamela (the First Defendant) born in 1960, and Alan (the Claimant) born in 1964.
5. On 30 July 1975, which was the Claimant’s 11<sup>th</sup> birthday, the family moved into a property called Briardale, at Chesley Hill, near Bristol. It appears to have been in the Testator’s sole name throughout.
6. The Testator developed and ran a coachbuilding business called A.G. Bracey Limited, with premises at Pucklechurch and Chesley Hill. It was successful, and the Testator was able to buy a number of properties in addition to Briardale. One called Linacre was in Shaldon, Devon, and consisted of a bungalow and about 11 acres of land. Another was at Ingleside Road, which was sold in 2016. There was also freehold land at Chesley Hill on which the business premises there were built.
7. In about 2011 there were a number of meetings with Dunkleys accountants to discuss inheritance tax planning. As a result a new company was formed, A.G. Bracey Properties Limited. Although I have not seen the relevant documents in relation to this company, I was informed that the Testator transferred to it the properties and land at Shaldon, Ingleside Road and Chesley Hill, which were held on discretionary trusts with the potential beneficiaries being the Claimant, the First Defendant, and any children of theirs.
8. In about October 2011 the Testator was diagnosed with Lewy Body dementia. Despite this, he retained testamentary capacity and there is no challenge to the validity of his Will executed on 31 July 2015.
9. On 12 December 2014 the Testator gave instructions for a new will to Angela Thomas, then a partner in the firm Kirby Sheppard LLP. She drafted the Will, and attended the Testator on 31 July 2015 when he executed it. By that date her firm had merged and become Barcan+Kirby LLP.

10. In May 2016 Mrs Irene Bracey, the Testator's wife, died. In late 2014 she had been described as very ill with sleep apnoea, and requiring oxygen therapy.
11. On 27 May 2018 the Testator died.

*The terms of the Will*

12. The Will appoints the Second Defendant as sole executrix and Trustee (clause 2(a)). The term "*my Trustees*" is defined by clause 2(b) as meaning (for the purposes of this case) the Second Defendant.
13. Clause 3 of the Will leaves the Testator's shares in A.G.Bracey Limited to the Claimant, who was then running the company. Clause 4 leaves his shares in A.G.Bracey Properties Limited to the Claimant and the First Defendant equally. The second numbered Clause 5 leaves the residue of his estate to the Claimant and the First Defendant in equal shares.
14. The issue in this case concerns the first numbered Clause 5 in the Will. It provides as follows:
  - a) *IN this clause:*
    - i) "*Dwelling*" means a freehold or leasehold house bungalow maisonette flat or flatlet in the United Kingdom and any grounds belonging to it
    - ii) "*my House*" means my house known as Briardale Chelsey Hill Bridgegate Bristol BS15 5NE and the grounds belonging to it or other the dwelling which I may own (or hold under a lease) as my principal residence at my death
    - iii) "*the Beneficiary*" means my wife IRENE DORIS BRACEY ("*my Wife*")
    - iv) "*the Trust Period*" means the period between my death and the death or earlier remarriage of the Beneficiary
  - b) *IF the Beneficiary survives me I GIVE my House (free of tax and free of any money charged or otherwise secured on it which shall be paid free of tax out of my residuary estate as shall the cost of discharging any security and any interest falling due before discharge) to my Trustees ON TRUST to pay any income from the property in which the proceeds are currently invested and any income from my House until sale to the Beneficiary during the Trust Period*
  - c) *DURING the Trust Period my Trustees shall not (subject to the Beneficiary's reasonable compliance with the terms of (e)) sell my House except with the Beneficiary's written consent but they shall sell my House at the Beneficiary's written request*
  - d) *FOR so long during the Trust Period as my House remains unsold my Trustees shall allow the Beneficiary to reside in my House*

- e) *THE Beneficiary (whether or not currently residing in it) shall pay all outgoings in respect of my House (and observe and perform all the covenants and conditions contained in any lease under which it may be held) and keep it in good repair and shall keep it insured comprehensively and to its full reinstatement value with insurers approved by my Trustees and in the joint names of the Beneficiary and them*
- f) *ANY money held by my Trustees under this clause may be invested in the acquisition of a Dwelling or in any other manner authorised by this Will in addition to all other powers for the investment of trust money (or partly in one way and partly in the other) and investments may at any time be transposed AND in deciding how to exercise these investment powers my Trustees shall have regard to the wishes of the Beneficiary*
- g) *THE trusts powers and provisions in the foregoing sub-clauses shall apply in relation to any Dwelling acquired under the provisions of sub-clause (f) in the same way as they apply in relation to my House*
- h) *WHEN the Trust Period ends my Trustees shall hold any property then the subject of this clause upon trust for my said son ALAN GEOFFREY BRACEY*

- 15. I should note that the postcode for the house known as Briardale is incorrect in the Will. It should be BS30 5NE. The area is also mistyped as “Chelsey Hill” rather than “Chesley Hill”. But no one suggests that these mistakes make the provisions of this Clause 5 ambiguous, or the provisions invalid on that account.
- 16. The proper construction of this Clause 5, as it stands or as amended by any rectification, governs whether the house known as Briardale goes to the Claimant or falls within the residuary estate, to be governed by the second numbered Clause 5.

*The proper approach to the construction of a will*

- 17. The first stage is to apply the common law rules of construction. It is accepted on both sides that these are set out in the Supreme Court case of *Marley v Rawlings* [2014] UKSC 2. Lord Neuberger dealt with them at paragraphs [17] to [26]. The court’s role is to identify the meaning of the relevant words in the light of a number of factors:
  - i) The natural and ordinary meaning of the words;
  - ii) The overall purpose of the will;
  - iii) Any other provisions of the will;
  - iv) The facts known or assumed by the parties at the time the will was executed; and
  - v) Common sense.

18. At this stage of the process, the court should ignore any subjective evidence of the testator's actual intention. If the court is able to reach an interpretation using this methodology, that is an end of the process.
19. The aim is to identify the intention of the testator by interpreting the words used in their documentary, factual and commercial context, as with the interpretation of a contract. In the old cases this is described as "the view from the testator's armchair".
20. At the second stage there is a further statutory aid to construction in limited circumstances. Section 21 of the 1982 Act provides as follows:

“(1) This section applies to a will – (a) in so far as any part of it is meaningless; (b) in so far as the language used in any part of it is ambiguous on the face of it; (c) in so far as evidence, other than evidence of the testator's intention, shows that the language used in any part of it is ambiguous in the light of surrounding circumstances.

(2) In so far as this section applies to a will extrinsic evidence, including evidence of the testator's intention, may be admitted to assist in its interpretation.”
21. The third stage, if the construction is clear but fails to carry out the testator's intentions, is to consider rectification of the will. Section 20(1) of the 1982 Act provides as follows:

“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.”
22. I shall deal first with the question of construction, and whether section 21 of the 1982 Act applies, before considering rectification under section 20.

### *Evidence*

23. The evidence put before me was directed largely to the question of the Testator's intention, if the stage is reached when that becomes relevant. The broad factual context which can be taken into account at the first stage of the process is largely set out in the Background section of this judgment above.
24. A lot of family evidence was filed in relation to what happened when Briardale was bought in 1975, and who helped the Testator most in the house and garden. There was also evidence about alleged loans by the Testator to the Claimant, and whether or not they had been repaid. I indicated at the start of the trial that I could see no circumstances in which that sort of evidence could be relevant to the issues I had to decide, and neither counsel for the Claimant nor the First Defendant sought to persuade me otherwise. I therefore omit this evidence from my summary.

*The instructions for and execution of the Will*

25. Angela Thomas gave evidence about the instructions for the Will and its execution. The instructions were taken on 10 December 2014 at the A.G. Bracey Ltd offices, with the Second Defendant present. Among other instructions, the Testator “specifically stated that he wished to give Briardale to his son” (the Claimant). It was Ms Thomas who asked what should happen if his wife survived him. The Testator then said that his wife should be able to live in Briardale rent-free for as long as she wished, but that Briardale was going to be given to the Claimant no matter what happened. She produced an attendance note which was a typed up version of her contemporaneous handwritten notes, with identical wording. The relevant passage reads as follows:

*“Lives with wife, very ill, sleep apnea [sic] – oxygen 18 months.*

*Wife has own money financially independent.*

*If leaving house to son – son said [she] could stay there, wife is in ill health.*

*Maureen [the Second Defendant] confirmed re sleep apnea and does not go out.*

*Needs to be looked after. Alan’s [the Testator’s] thoughts are she is entitled to stay in house as long as she wishes.*

*5 bedroom house.*

*Leave to son with provision that she lives there as long as she wants to – rent free.*

*House worth over one million.*

*Just two live there,*

*two children*

*Trouble as some will be getting more than others. Alan Junior [the Claimant] has been involved in business many years.”*

26. Following that meeting, Ms Thomas prepared a draft of the Will using a computer. Her firm, as is common, had a bank of precedents based on the Butterworths Wills, Probate & Administration Service. The standard clause for a life interest trust ended with the property becoming an accretion to the residuary estate, which is not what the Testator wanted. The residuary estate was to go to his two children, the Claimant and the First Defendant, in equal shares. The Testator wanted Briardale to go to the Claimant in any event, subject only to the life interest to his wife if she survived him. Ms Thomas therefore edited the precedent, not only to define “my House” and “the Beneficiary” and to delete reference to “the Contents”, but also to re-write sub-clause (h) to leave Briardale eventually to the Claimant. There was no other available precedent which achieved that purpose.

27. She thought that her amendment achieved what the Testator wanted. It was only after challenges to the Will arose, and a *Larke v Nugus* letter was requested, that she thought it could have been better drafted. Her statement says that the words “*IF the Beneficiary survives me*” should have been deleted from the beginning of Clause 5(b), and the words “*or if the Beneficiary fails to survive me*” should have been inserted in Clause 5(h) after “*WHEN the Trust Period ends*”. She described these failures of drafting as “clerical errors”, although I am sure this terminology was used because it appears in section 20 of the 1982 Act and I do not place any particular weight on it.
28. On 31 July 2015 Angela Thomas returned to the A.G. Bracey offices to see the Testator. The Second Defendant was again present. Ms Thomas confirmed her instructions before the Will was executed. The relevant part of her attendance note records as follows:
- “Pamela doesn’t get anything from business.*
- Property shares Pamela and Alan equally.*
- Briardale “Alan” but confirmed life interest.*
- Business just to Alan.*
- Property Company 50/50 between children – know Pamela gets this.*
- Briardale to Alan.”*
29. The Second Defendant gave evidence supporting this, and stating that the Testator would often tell the Claimant, both in her presence and in the presence of others, that he would inherit Briardale. She believed that the First Defendant was also aware of this. In cross-examination she said that Briardale was always something the Testator was very proud to leave to his son. He planned to leave another bungalow (the one in Shaldon) to the First Defendant.
30. The instructions from the Testator, and his intention at the time of giving those instructions and later executing his Will, could not be clearer. He wanted Briardale to go to the Claimant directly, subject only to a life interest to his wife if she survived him. He did not want Briardale to pass into his residuary estate to be divided equally between his two children. Mr Knight, for the First Defendant, did not challenge this. He floated the idea that the Testator’s intention might have been affected by his Lewy Body dementia, and invited my attention to discussions in 2011 about Inheritance Tax planning. But the early challenge to testamentary capacity was abandoned, and cannot be revived in these proceedings by a side wind.
31. Accordingly, these are very clear instructions from a Testator with the mental capacity to make a will. Whether I can take his intention into account is a matter of law.

#### *Family Evidence*

32. The Claimant said that for many years he had been told by his father that he would inherit Briardale. His father would say “One day, son, all this will be yours”. He recounted an incident when visiting a hotel in Leeds and there was light-hearted

discussion with the receptionist about addresses, and the size of his father's house. The receptionist asked if he also had a big house, and the Claimant replied that he would just "wait until the old man dies" and then would have his. This was said in the presence of the Testator, who made no objection then or later.

33. He also recalled a meeting with Mike Dunkley, an accountant, in around 2011/2012 at a meeting called to discuss tax planning. At that stage the Testator said that he would leave his shares in the business to the Claimant, along with the land at Chesley Hill where the business operated, and Briardale (which is also in Chesley Hill). The First Defendant was to inherit Linacre, the bungalow in Shaldon, with about 11 acres surrounding it. The First Defendant was not at that meeting and the Testator asked the Claimant to tell her what he had said. According to the Claimant that happened at a lunch at the Commodore Hotel in Sand Bay, near Weston-super-Mare.
34. There was no evidence from Mr Dunkley, nor was the whole of his file produced. There was a file note of a meeting on Friday 27 May 2011, and an undated note headed "Actions to be taken regarding reduction of Inheritance Tax" which probably came from Mr Dunkley at around the same time.
35. The file note of the May 2011 meeting starts by stating that "The document entitled A G Bracey Esq, Review of Assets, Inheritance Tax, Capital Gains Tax and Planning opportunities was reviewed and discussed". That document was not produced to me. It makes interpretation of what follows somewhat difficult. It is correct that a paragraph reads as follows, but the schedule referred to is not attached:

"With respect to other matters, whilst a schedule of who was to inherit what had been drawn up, Mr Bracey reiterated his desire that with the exception of A G Bracey Limited which was to pass to A G Bracey Junior because of its continuance and growth etc was to do with his efforts, all other assets of Mr Alan Bracey Senior were to be passed 50/50 to his children and that the attempt at allocating assets specifically one way or another way was in order to try and balance matters."

36. The undated document may well have post-dated this meeting of May 2011, as it contemplates setting up a company with 50 A shares and 950 B shares, with the B shares being held by a discretionary trust. The document includes the following note:

*"9. Alan Senior's wishes are his assets are split so that Alan Junior gets A G Bracey Limited, and then all other assets are split 50:50.*

*i.e. If the estate was:-*

*£1m Briardale.*

*£3m regarding assets in the company [this must mean the property company to be set up].*

*And Alan Junior took Briardale, and then Pam would get 2/3<sup>rd</sup> of the company and Alan Junior 1/3<sup>rd</sup>."*



37. In the light of these partial documents, I can accept that the Testator told the Claimant consistently that he would get Briardale. The precise mechanism, and how that might be balanced for the First Defendant, changed from time to time.
38. The Claimant said in cross-examination that there were several meetings about this time. That may well be true. I can place no weight on two random documents setting out possibilities. The general principle that the Testator wished to be fair to his two children is not in dispute, but “fair” does not always mean “equal”, and what the Testator wanted to do in 2014/2015 is clear.
39. It follows that what happened at the lunch in Sand Bay is of little relevance. The First Defendant and her husband say that there was no mention of Briardale at that lunch. But she says there was a more formal meeting later which she attended, together with the Testator, the Claimant, the Second Defendant, Mr Dunkley, and a solicitor, Iain Stuart Grant, who was to draw up a new will for the Testator (though none was produced or executed at that time). This cannot have been the meeting in May 2011, which she did not attend, nor did Mr Grant. It follows that the documents produced disclose only a small part of what was discussed in 2011/2012.
40. The Claimant also spoke of a meeting with the First Defendant and her husband on 4 September 2016, which was their mother’s birthday, although she had died earlier in the year. He recalls a discussion at lunch at The Wishing Well, Codrington about the possibility of him and his partner moving into Briardale if the Testator had to go into a care home “as everyone knew he was leaving it to me anyway”.
41. The First Defendant’s recollection, supported by her husband, is a little different. It is that the possibility of the Claimant moving into Briardale was only raised in the car as they passed the Crematorium. She took it as referring to a temporary measure while building work was going on at their house, and there was no mention of Briardale being left to the Claimant anyway.
42. I do not have to resolve this difference of recollection, as it goes only to the Testator’s intention, and what his children knew or thought is irrelevant when there is clear evidence of the Testator’s instructions. I will approach the evidence on the basis of the limited agreement that the possibility of the Claimant moving into Briardale was raised, but nothing more said about it.

*Submissions on the proper construction of this Will*

43. The key phrase is in Clause 5(h), which provides for “*any property then the subject of this clause*” [meaning Briardale in the circumstances obtaining at the date of death] to be held on trust for the Claimant “*when the Trust Period ends*”.
44. Mr Ball for the Claimant submits that the “*Trust Period*” is confusingly named, because it can exist without any trust being created. He accepts that Clause 5(a)(iv) taken in isolation suggests a period running from the date of death. It is at least potentially ambiguous. But taken in the context of the whole document, and its context, he submits that the meaning is clear.
45. The period from the date of the Testator’s death may go forward in time (so creating a trust by virtue of Clause 5(b)), but also may go backwards in time (as here, where the

death of the Beneficiary came before the death of the Testator). In the latter event, no trust in favour of the Beneficiary arises under Clause 5(b), but a trust is created by virtue of Clause 5(h) in favour of the Claimant at the end of the period, which is the date of the Testator's death.

46. Alternatively, Mr Ball submits that, if the "*Trust Period*" can only be prospective, and must start on the date of the Testator's death, it nevertheless may have a zero value, being treated as arising and ending on the same day. The concept of events which logically should be sequential being treated in law as simultaneous, having zero length, is already enshrined in caselaw relating to mortgage priorities.
47. In terms of the strict construction of Clause 5, Mr Ball submits, sub-clause (a) applies to every other sub-clause, but all the other sub-clauses stand on their own. Thus sub-clause (b) is conditional on the survival of the Beneficiary. Sub-clause (c) is conditional only on the subsistence of the Trust Period. This requires the same facts as sub-clause (b), but sub-clause (c) is not conditional on sub-clause (b). The same argument applies to sub-clause (d) and so on. So all sub-clauses which are factually conditional on the survival of the Beneficiary are independently so, not dependent on sub-clause (b). There is nothing odd, therefore, in sub-clause (h) being independent of the condition in sub-clause (b) as well. Sub-clause (h) directs the Trustees to "hold" the property on trust for the Claimant, rather than using the word "give" as in sub-clause (b), but the term "my Trustees" is defined by Clause 2(b) to mean the Second Defendant as executrix, and on the Testator's death the property would pass to her in that office automatically without the need of a gift.
48. Mr Ball points out there is no dispute that the Testator by his Will gave Briardale to the Claimant in certain circumstances. The question is whether that happens in all circumstances. It would be odd if that depended on the chance of the Testator's wife surviving him. That is especially true, he submits, when both the Testator and his wife were known at the time of the Will to have serious illnesses, and there could be no expectation of one surviving the other.
49. Mr Ball relies on the judgment of Lord Neuberger in *RSPCA v Sharp* [2011] 1 WLR 980, at [37]-[38], where he points out that "a will is to be construed as a whole, and clear words are required before one construes one clause as being subject or subordinate to another, simply because it is later in the will than the other clause".
50. He also referred me to the speech of Lord Cranworth in *Ricketts v Carpenter* [1843-60] All ER Rep 482, at p.489:

"Where, by acting on one interpretation of the words used, we are driven to the conclusion that the person using them is acting capriciously, without any intelligible motive, contrary to the ordinary mode in which men in general act in similar cases, there, if the language admits of two constructions, we may reasonably and properly adopt that which avoids these anomalies, even though the construction adopted is not the most obvious or the most grammatically accurate."

An example of using energetic linguistic gymnastics to avoid an anomaly, he submits, is *Esson v Esson* [2009] EWHC 3045 (Ch).

51. It seems to me that these are no more than another way of expressing and applying the principles summarised by Lord Neuberger in *Marley v Rawlings* at [19]. Another example was drawn to my attention by Mr Entwistle for the Second Defendant, who did not cross-examine but addressed me briefly on the law. In *Reading v Reading* [2015] EWHC 946 (Ch) Asplin J (as she then was) had to construe a provision in a will which referred to the “issue” of the testator. The testator clearly intended to include his children and his stepchildren, but this intention had to be disregarded at the first stage of construction. Asplin J concluded that “issue” in its ordinary and natural meaning did not include stepchildren, but in the context of the will as a whole, and the known or assumed surrounding facts, it did include stepchildren.
52. Mr Knight for the First Defendant submits that, because Mrs Irene Bracey did not survive the Testator, no Trust Period arose. Therefore there can be no point at which “*the Trust Period ends*”. He agrees that the definition of “Trust Period” does not require the creation of any trust, despite its name. But he submits that a “period” must start with the death of the Testator (as a will has no effect before that date) and must have some positive length thereafter.
53. He points out that Clause 5(h), unlike Clause 5(b), does not give the property to the trustees but assumes they are already holding it. Therefore it is nonsense to say that the sub-clauses operate independently. As to the contention that there may be a zero period, that might be true in mathematical theory, but is not the case in real life.
54. Mr Knight relies on *Jump v Jones* [2016] EWHC 2160 (Ch). That concerned mirror wills, but the draftsman included a provision requiring the survivor to have survived the testator for 28 days. In fact both husband and wife died within 28 days of each other. The judge found that the meaning was clear, even though it undermined the intentions of both testators. Curiously, neither section 21 nor section 20 of the 1982 Act was argued. It is therefore purely a decision on the construction of the particular words.
55. As further support for his submission that if the words of a will are clear, a strange outcome alone is not enough, Mr Knight referred me to *Lucas v Eagle* [2015] EWHC 476 (Ch) at [13]. I accept this is the case where there is no ambiguity, even after considering the context. It does not conflict with cases such as *Reading v Reading* where the context showed an ambiguity which did not appear on the face of the word used, and which was sufficient to reverse the normal meaning.

#### *Conclusions on construction of the Will*

56. In my judgment there is nothing illogical in a will identifying a period of time between two then unknown dates, one of which is the testator’s death. That period may start before his death, if the other unknown date occurs first, or it may start with his death, if the other unknown date has not then occurred. The former is the position in this case, as the other unknown date was the date of death or earlier remarriage of his wife, the Beneficiary, who had already died at the date of the Testator’s death.
57. If the period can only be viewed from the date of the Testator’s death, there is still nothing illogical in the period having a positive value if the other unknown date has not then occurred, but a negative value if the other date has by then occurred in the past. Where it has a negative value, the period exists, but must be taken as ending at the date of the Testator’s death.

58. If I am wrong about that, and the period must start at the Testator's death and be prospective, as Mr Knight submits, I can see no reason why there should not be a notional period of zero duration. The argument that a period of zero duration can never have an end, because it never begins, is a form of Zeno's Paradox. These are philosophical problems which seem logical mathematically, but which are contrary to perceived experience. One such paradox proposes that since an arrow on its way to a target must first pass through the halfway point, and then the halfway point of the remaining distance, and so on for an infinite number of halfway points, it can never reach its target (and therefore St Sebastian died of fright, as Tom Stoppard put it in his play *Jumpers*).
59. For these reasons I conclude that the natural and ordinary meaning of "*when the Trust Period ends*" in Clause 5(h) is that it refers to the later of the Testator's death and the death or earlier remarriage of his wife. In this case that is the date of the Testator's death, at which point the trust imposed by Clause 5(h) arose.
60. It might have been better for the understanding of the clause if the period had been called the "*Survival Period*" rather than the "*Trust Period*". But the definition of that term, in Clause 5(a)(iv) of the Will, does not depend on the creation or existence of any trust during that period.
61. The potential trusts are provided by Clauses 5(b) and 5(h). Each of these provisions stands alone, subject only to the overriding interpretations defined by Clause 5(a). So, ignoring sub-clauses (b) to (g) which do not arise where the Beneficiary does not survive the Testator (as happened here), the Will in practice provides as follows:
- i) [Clause 5(a)(iv)] The "Trust Period" means the period between 27 May 2018 [*the Testator's death*] and May 2016 [*the death of his wife Irene*].
  - ii) [Clause 5(h)] When the "Trust Period" ends [*i.e. the later date of 27 May 2018, when the Testator died*] the property is to be held on trust for the Claimant.
62. I reach this interpretation by simply applying the natural and ordinary meaning of the words used in the Will. In my judgment it is reinforced by looking at the internal evidence from the Will, namely, its overall purpose, its other provisions and common sense, as well as relevant other facts known or assumed by the parties at the time the Will was executed, excluding subjective evidence of the Testator's intentions. Such relevant facts are as follows:
- i) The Testator had been diagnosed with Lewy Body Dementia, which would be progressive, so that there was little or no realistic prospect of his having the capacity to change his will in future.
  - ii) The Beneficiary, Mrs Irene Bracey, was herself very ill with sleep apnoea and requiring oxygen treatment.
  - iii) As a result, there could be no clear expectation that the Beneficiary would survive the Testator, or vice versa.
63. In these circumstances, it would be almost capricious to make the operation of a provision leaving Briardale to the Claimant dependent on the chance of which parent

succumbed to existing illness first. The situation is akin to that in *Reading v Reading* which led Asplin J to remark (at [43]):

“It would seem odd if the structure of the will was such that the children and stepchildren took the residue if the testator was second to die but the stepchildren were afforded no interest in the nil-rate band trust and therefore in the testator’s estate at all if he were first to die.”

So here, it would seem odd if the structure of the will was such that the Claimant took Briardale if the Testator were first to die (before his wife) but not if the Testator were second to die.

64. For these reasons I conclude that the true construction of the first numbered Clause 5 means that the Second Defendant as executrix holds Briardale upon trust for the Claimant, and this property does not fall within the Testator’s residuary estate.

*Conclusion on section 21 of the 1982 Act*

65. If I am wrong about this construction of Clause 5(h), it must at least be ambiguous. That is to say, it would be open to both this interpretation and the one argued for by the First Defendant, with no way of distinguishing between them on the face of the document. In those circumstances, evidence of the testator’s intention may be admitted under section 21 of the 1982 Act.
66. I reject Mr Knight’s submission that Clause 5(h) is not reasonably capable of more than one meaning (on the assumption that I am wrong to reject his proposed meaning). I also think that Mr Ball is wrong to submit that it is potentially meaningless if it does not have the meaning he proposes. A provision in a will is not meaningless just because it may not come into effect, depending on the facts at the date of death.
67. As I have noted above, and is not disputed on behalf of the First Defendant, the clear intention of Testator was for Claimant to inherit Briardale sooner or later, subject only to life interest in Mrs Irene Bracey.
68. The effect of this intention is to resolve the ambiguity which would exist if I am wrong in my principal conclusion about construction, and the same result would be achieved.

*Rectification*

69. In case I am wrong about this, I turn next to consider the claim for rectification. This of course only arises if the natural meaning of Clause 5(h) is as contended for by Mr Knight, and there is no ambiguity.
70. There can be no doubt in these circumstances that the first requirement of section 20 of the 1982 Act would be satisfied, and that the “will is so expressed that it fails to carry out the testator’s intentions”. It cannot be said that Angela Thomas failed to understand his instructions. Therefore the application of section 20 depends on whether the failure in the Will arose in consequence of “a clerical error”.
71. The term “clerical error” may have a narrow or a wide meaning. The Supreme Court in *Marley v Rawlings* decided that it should be given its wider meaning, so that the grounds

for rectification are “as wide for wills as the words of section 20(1) can properly allow” (at paragraph [77]).

72. Thus it may cover where a solicitor “writes something which he did not intend to insert, or omits something which he intended to insert” (per Blackburne J in *Bell v Georgiou* [2002] EWHC 1080 (Ch)). That error may be a wrong word, figure or name; or it may be the insertion of a wrong clause; or even a series of clauses (*Marley v Rawlings* at [72]). It should cover “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)” (*Marley v Rawlings* at [75]).
73. Lord Neuberger stated, in support of this wide meaning, that “the law would be somewhat incoherent if subtle distinctions led to very different results in cases where the ultimate nature of the mistake is the same” (at [80]). In the context of that case, “a distinction of this sort seems to me to be capricious or arbitrary” (at [81]). He continued in paragraph [81]:

“In each case, the reason that the will which A executed did not represent his intentions was a silly mistake by the solicitor in the mechanics of faithfully carrying out his instructions. In neither case did the mistake involve the solicitor misunderstanding or mischaracterising the testator’s intention or instructions, or making any error of law or other expertise, so the error may fairly be characterised as “clerical” – and there is no question of trespassing into section 20(1)(b) territory.”

#### *Submissions on rectification*

74. Mr Knight’s first submission is that convincing evidence of actual intention is required, relying on *Giles v Royal National Institute for the Blind* [2014] EWHC 1373 (Ch). But that is clearly satisfied by the evidence of intention in this case.
75. Mr Knight then points to the three categories identified by Mr Evans-Lombe QC (as he then was) in *Wordingham v Royal Exchange Trust* [1992] Ch 412, at 419F. These, he submits, are as follows:
- i) An error made in the process of recording the intended words of the testator in the drafting or transcription of the will. This, he submits, would be a clerical error, liable to rectification under section 20(1)(a).
  - ii) An error made in carrying the testator’s intentions into effect by the drafter’s choice of words. This, he submits, is not a clerical error, and would fall outside section 20.
  - iii) A mistaken choice of words because of a failure to understand the testator’s intentions. This, he submits, would be liable to rectification under section 20(1)(b).

76. On this analysis, Mr Knight submits that this is clearly a category 2 case, because Ms Thomas chose the wrong words. He further submits that, using Lord Neuberger’s tests in *Marley v Rawlings* at [75], what Ms Thomas was doing involved “special expertise”.
77. Finally, Mr Knight submits that section 20 gives the court a discretion, and points again to the evidence of the equal shares being considered in 2011.
78. Mr Ball submits that this is a “clerical error” even using the narrow meaning. He relies on the passage from *Theobald on Wills* cited in *Wordingham* at p.418B:
- “The expression 'clerical error' points to the nature of the error, not to the person who made it. It appears to cover the situation where the material words were inserted in, or omitted from, the will owing to an error on the part of the testator, the draftsman or the engrosser, who did not advert to the significance and effect of the words inserted or omitted.”
79. Mr Ball submits that this is an error of omission. Ms Thomas’s instructions were to include a gift of Briardale to the Claimant, subject to a life interest to his mother if she survived his father. That gift was omitted. Alternatively, there was an omission of the words “or if the Beneficiary does not survive me” in Clause 5(h), as Ms Thomas suggests. Either would class as a clerical error as properly understood.
80. Mr Ball accepts that this was not a mere “slip of the pen”, nor was it merely the result of using a precedent, as Clause 5(h) was substantially rewritten. But Ms Thomas never stood back to consider the effect of Clause 5 as a whole (on the assumption that Mr Knight is correct about its construction). That was a failure to “advert to the significance of the words inserted or omitted”.
81. Mr Ball referred me to *Austin v Woodward* [2011] EWHC 2458 (Ch), at [7]-[10], and points out the similarity of the provisions there being considered with Clause 5 in this Will. He also relies on *Lines v Porter* [2011] EWHC 2310 (Ch) at [19]. He distinguishes *Reading v Reading* as being obiter in relation to rectification, but also because it was not a case of insertion or omission, but of using a term of art incorrectly.

#### *Conclusions on rectification*

82. If considering the case purely on basis of Lord Neuberger’s observations in *Marley v Rawlings*, I would hold this was a “clerical error”. It was (if in truth it was a mistake at all, and my primary conclusions are wrong) “a silly mistake by the solicitor in the mechanics of faithfully carrying out his [the Testator’s] instructions”. It resulted from a failure to appreciate that, if the Beneficiary did not survive the Testator, there would be no Trust Period to end (on the assumptions underlying my consideration of this stage). That led to the omission of an alternative condition to the end of the Trust Period of “*if the Beneficiary fails to survive me*”.
83. This conclusion seems to me to accord with all the policy considerations explained by Lord Neuberger, and the Supreme Court’s decision that the ground for rectification should be “as wide for wills as the words of section 20(1) can properly allow”.

84. *Wordingham* pre-dates *Marley v Rawlings*, and if inconsistent with it must be taken to have been overruled. The same, of course, can be said about *Austin v Woodward* and *Lines v Porter*, on which Mr Ball relies.
85. The one case which post-dates *Marley v Rawlings* is *Reading v Reading*. Although strictly speaking not binding on me, I would have the greatest respect for the judge, now Asplin LJ, and the views she expressed there. She concluded that rectification under section 21 of the 1982 Act would not have been available as the choice of the word “issue” was not a “clerical error”, but related to the professional judgment and expertise of the solicitor who drafted the will.
86. I have some doubts about this, both in the context of the old law, and particularly in the light of Lord Neuberger’s wide interpretation of the phrase in *Marley v Rawlings*. I think it is sufficient to say that the concepts are different, as *Reading v Reading* involved a positive choice of a word which had an established legal meaning, whereas this case involves the omission of words to make clear what conditions apply to a disposition. Accordingly I do not think I am forced to depart from that decision, or to decline to follow it, in order to conclude that rectification would be available here.
87. In my judgment what was omitted (if I am wrong on my primary conclusions and the proper construction of Clause 5(h) is contrary to the Testator’s instructions) was a simple set of words making it clear that Briardale would go to the Claimant not only if his mother survived his father, and took a life interest in the property, but also if (as happened) she died first and there was no life interest. If necessary (contrary to my primary findings), the Will should be rectified to include this.

#### *Orders*

88. I will ask counsel to discuss and agree a form of order to reflect my conclusions in this judgment.
89. I hope they will be able to agree any orders for costs as well. If not, I will determine the issues as far as possible on written submissions.