



Neutral Citation Number: [2023] EWHC 1524 (Ch)

Case No: PT-2021-001103

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

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

Date: 23/6/2023

Before:

MASTER CLARK

Between:

CHRISTOPHER RICHARD LATTIMER

Claimant

- and -

MARIA KARAMANOLI

Defendant

Thomas Entwistle (instructed by **Hugh James**) for the **Claimant**
Alper Riza KC and **James McKean** (instructed by **Rothley Law**) for the **Defendant**

Hearing date: 1 June 2023

Approved Judgment

I direct that this approved judgment, sent to the parties by email at 10am on 23 June 2023, shall be deemed to be handed down on that date, and copies of this version as handed down may be treated as authentic.

.....

Master Clark:

1. This is my judgment on 2 applications:
 - (1) the claimant's application dated 3 February 2023 seeking summary judgment on part of his claim; and reverse summary judgment and/or to strike out the defendant's counterclaim insofar as it seeks rectification;
 - (2) the defendant's application dated 24 May 2023 seeking permission to amend her defence and counterclaim.

Parties and the factual background

2. The claim concerns the estate of Evi Kalodiki ("**the testator**"), who died on 31 December 2018 aged 62 in the St John Hospice in London.
3. The claimant, Christopher Lattimer, claims as the husband of the testator, and sole beneficiary under the intestacy he claims arises as a result of her will dated 27 December 2018 ("**the Will**") being revoked by her marriage to him on 28 December 2018.
4. The defendant, Maria Karamanoli, is the sister of the testator, and named as a beneficiary in the Will.
5. The total value of the testator's estate is about £10 million, of which about £3 million is land and money in bank accounts in England, and the remainder is land, money and shares in the Republic of Cyprus and Greece.
6. The key events giving rise to the claim took place over less than 2 weeks. On 17 December 2018, the testator was admitted on an emergency basis to the hospice. She was terminally ill with lung cancer. The hospice notes record her saying that she lived alone and had no partner. The claimant, who accompanied her on her admission was described by her as:
 - "close friend"
 - "friend (former student)"
 - "friend, sometimes stays with [the testator]"The claimant was also recorded by the hospice as being "NOK", which I assume means "next of kin".
7. On 24 December 2018, the testator left the hospice on a temporary basis to spend Christmas with the claimant and his family in Croydon.
8. On 27 December 2018, the claimant drove the testator back to the hospice. The claimant's evidence is that on the drive back, she looked terrible, and he became concerned that her time was short. He continues:

“I also told her that it would be irresponsible and unkind of her to let her (*sic*) die and leave me all alone and unsupported to face her family. Evi interjected and stated “Are you asking me to marry you?” At this point I said that this was not what I meant but I agreed to the marriage which Evi took as a proposal by me.”

9. The claimant says that the testator, whose faith was Greek Orthodox, then contacted her long time confidant and friend, Father Damian Konstantinou¹; and that he arranged a Greek Orthodox ceremony later that day in the chapel of the Hospital of St John and St Elizabeth. The claimant says he also spoke to Father Damian and “helped.”

10. The claimant’s evidence is that also on the same day, though it is unclear when, Father Damian raised the matter of the Will:

“43. ... he said to me “You must write a Will, there is not much time”. I said: “Do I need special headed Hospice paper” and proceeded to write on an available sheet of paper. I then said: “What should I say?” and Father Damian started to dictate the terms of the Will.

44. The Will was handwritten by me again on that same day, 27.12.2018. The Will was a collaboration between Father Damian and Evi, and I wrote down how Evi told me that she wished her estate to be distributed. My role was secretarial. Evi checked the draft of the Will carefully and stated “4% to lawyers is too much”. She then said: “1/6 for [me] is about right because you were with me for a decade”. Evi named Pavlos as executor and provided information with additional details of the recipients.”

11. The doctor on duty at the hospice that day, Dr O’Hanlon, records in his notes that on the testator’s return to the hospice, she announced to him her engagement plans with the claimant. He also records that she asked him for a written statement of her capacity for decision making; and that he responded by saying that he could issue a letter as to her capacity for medical decision making, but legal decision making should be assessed by a solicitor. He records that she appeared to be dying. On the same date, Dr O’Hanlon signed a letter setting out that at the time of writing the letter, the testator had full capacity for medical decision making.

12. The Will was executed on 27 December 2018. The witnesses were Father Damian and a witness arranged by him called Iosif Charalambos. At the testator’s request, a photograph was taken of her signing the Will. After setting out that it is prepared at the hospice, it continues:

“The details are overleaf where my wish is for my estate to be divided into six equal parts to six beneficiaries.

¹ whose full title is The Very Reverend Archimandrite Damianos-Ionannii Konstantinou.

This is my last and only will. The remaining 4% is for legal fees, funeral costs and execution of the will.”

13. The 6 beneficiaries named in the Will, each receiving 16%, are the claimant, the defendant, her 2 daughters and one son, and an organisation called the Sarantaris Society.
14. In the evening of 27 December, at about 8pm, the claimant and the testator were married in a religious ceremony by Father Damian. The witnesses at that ceremony were the two people who witnessed the execution of the Will.
15. The claimant’s evidence is that on the following day, 28 December 2018,

“45. ... Evi first mentioned her wish to “legalise the marriage”, to use her words, by way of a formal civil ceremony. In truth, this came as quite a surprise to me but Evi was characteristically very insistent on this.”
16. The hospice notes for 28 December 2018 record the testator as saying “Feels she will now die as is married and once seen solicitor will be ready”, and under the heading “Plans”, “Solicitor to see this afternoon”. No solicitor did in fact attend.
17. At 11.28 on 28 December 2018, Westminster Register Office sent an email to the testator’s email address, intended to be copied to the claimant (but his name is misspelt in the email address used), stating:

“Dear Ms Kalodiki and Mr Lattimer,
Please see attached for the letter which the doctor will need to write and sign before we go ahead with the ceremony.”
18. The attachment to this email was not in evidence, but the clear inference to be drawn is that it was the template for the letter on the hospice’s note paper dated 28 December 2018 signed by Dr Marilina Monti stating (amongst other things) that the testator “understands the nature and purport of the marriage ceremony”. Dr Monti describes herself as “Registrar to Dr Edith Israel (Consultant in Palliative Medicine); and the hospice notes record Dr Israel seeing the testator at 15.30 on her ward round on 28 December.
19. The civil marriage ceremony took place on 28 December. The defendant was one of the 2 witnesses to the marriage. There is no suggestion that she objected at the time to the marriage taking place.
20. On 30 December 2018, an email from the testator’s email account (and apparently written by her) was sent to 2 of her contacts at Loyola University:

“You are the first to know after Maria and the children that on Dec the 27th 2018 Chris proposed to me, he converted to Christian Orthodox and we got married in a religious ceremony & on the 28-12-18 we had a legal ceremony at St John & Liz’s hospice.

...

Thank God my brain is fine. However, the shortage of breath is severe.

...

Kind regards

Evi Kalodiki-Lattimer”

21. By 31 December 2018, the testator had severely deteriorated, and she died later that day.

Procedural background

22. On 11 August 2021, the defendant made an application in the Central Family Court under s.55 of the Family Law Act 1986 (claim no. ZC21D00029 – “the Family Claim”). The application notice (prescribed form D70) is headed “Application for declaration of marital/civil partnership status”. There is no space on the form for stating the declaration sought. However, the stated grounds for the application include an allegation that the marriage was not valid under s.3 of the Marriage (Registrar General’s Licence) Act 1970.
23. The claimant’s acknowledgment of service in the Family Claim seeks:
- (1) a declaration that the marriage was at its inception valid;
 - (2) a declaration that the marriage subsisted when the testator died;
 - (3) a declaration that the testator died domiciled in England and Wales;
 - (4) a declaration that the testator died intestate;
 - (5) a declaration that the claimant is entitled to the whole of the testator’s estate;
 - (6) an order that letters of administration in the testator’s estate be granted to him.
24. This claim was issued on 23 December 2021.
25. The relief sought in the claim form is:
- (1) a declaration that the testator died intestate;
 - (2) a declaration that the claimant is solely entitled to her estate in England and Wales, and to her moveable assets worldwide;
 - (3) a grant of letters of administration to her estate.
26. On 4 January 2022, HHJ Evans-Gordon made an order transferring the Family Claim to the Business and Property Courts, to be heard and case managed with this claim.
27. There was a case management conference before Deputy Master McQuail on 22 June 2022, at which directions to trial were given. Disclosure and exchange of witness

statements have taken place. The claim is therefore ready for trial (though unfortunately, due to an oversight by the court, it remains unlisted).

28. The claimant's application was issued on 3 February 2023. It seeks summary judgment on the following parts of his claim:

- (1) the declaration that the Will was revoked such that the testator died intestate;
- (2) the declarations (sought in the Family Claim) that the marriage was valid at its inception and subsisted when the testator died;
- (3) an order that a grant of letters of administration be made to the claimant – this is a consequence of the testator's intestacy, as the claimant is the only beneficiary under the rules of intestacy in this jurisdiction;
- (4) reverse summary judgment against the defendant in respect of the defendant's counterclaim to rectify the Will.

The claimant does not seek summary judgment in respect of his claims for a declaration that the testator died domiciled in England and Wales, or for a declaration that he is entitled to the whole of her estate.

29. The proposed amended defence defends the claim on the following grounds:

- (1) The testator was not domiciled in England and Wales, and was domiciled in the Republic of Cyprus (so that succession to her moveable assets is governed by the law of that country, and not by English law).
- (2) The marriage did not revoke the Will:
 - (i) on its true construction, the Will was made in expectation of marriage; alternatively
 - (ii) the Will is to be rectified to be so expressed.
- (3) The Will is to be rectified so "my estate" refers only to the testator's English estate.
- (4) The marriage was invalid, because the claimant took unfair advantage of the testator.
- (5) The marriage is void or unlawful and was therefore incapable of revoking the Will.
- (6) The court should not enforce the claimant's rights because to do so would be contrary to public policy and/or the principle of *ex turpi causa non oritur actio*.

30. The evidence in support of the claimant's application comprised his witness statement dated 3 February 2023, although the defendant also put before the court

- (1) his witness statement dated 6 September 2021 (but not its exhibit) in the Family Claim;
- (2) his trial witness statement dated 21 September 2021 (but not its exhibit);

31. The defendant's evidence comprised:

- (1) her witness statement dated 22 May 2023 in opposition to the application;

- (2) various key documents referred to in the course of this judgment;
- (3) the hospice's medical notes.

Summary judgment and strike out – legal principles

32. CPR 3.4(2) provides, so far as relevant:

“3.4— Power to strike out a statement of case

- (2) The court may strike out a statement of case if it appears to the court—
 - (a) that the statement of case discloses no reasonable grounds for bringing ...the claim;
 - (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings;”

33. CPR 24.2 provides, so far as relevant:

“The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –

- (a) it considers that –
 - ...
 - (ii) that defendant has no real prospect of successfully defending the claim or issue; and
- (b) there is no other compelling reason why the case or issue should be disposed of at a trial.”

34. The principles to be applied on applications for summary judgment are well established. They were summarised by Lewison J, as he then was, in *Easyair Ltd v Opal Telecom Limited* [2009] EWHC 339 (Ch). It is unnecessary to set them out here. The burden of proof is on the applicant to show that the conditions in CPR 24.2 are satisfied.

35. As to striking out for no reasonable grounds, as noted in the White Book (para 3.4.21), there is a considerable overlap between the court's powers under CPR Part 24 and r.3.4; and the court has a discretion to treat an application made under CPR 3.4 (2)(a) as if it were an application under Part 24. In this case, there is no practical distinction in the test to be applied.

36. As to the evidential basis on which the court approaches a summary judgment application, the position is set out in the Court of Appeal decision of *Bhamani v Sattar* [2021] EWCA Civ 243 at [62]:

“... the assessment that the judge undertakes under Part 24 is one of assessing the evidence, not the pleadings. The question is not whether the pleaded defence has a prospect of succeeding, but whether the defendant has no real prospect of successfully defending the claim. What then is a judge to do if the defendant's

evidence appears sufficient to raise a triable issue, but the defendant has served a defence in which the relevant defence has not yet been pleaded? Unless the judge can rule out any possibility of amendment (which would be unusual) I see nothing wrong in the judge concluding that the defendant had some real prospect of success even though this would require the defendant to amend.”

37. As to the second limb of the test in CPR 24.2, in *Iliffe v Feltham Construction* [2015] CP Rep 41, Jackson LJ considered that the fact of a trial come what may would constitute a ‘compelling reason’ not to enter summary judgment within the meaning of CPR r. 24.2(b). As set out at [73]:

“A further significant feature is that summary judgment in this case achieves much less in terms of saving costs and court time than is normal. There is going to be a trial anyway at which extensive factual and expert evidence will be called in order to establish (a) what caused the fire, (b) who is responsible. The claimants will have to participate in the trial, because they need to prove the quantum of their damages.”

Amendment

38. The test for whether an amendment should be permitted is the same test as for summary judgment: whether the amendment has a real prospect of success (see the 2023 White Book at para 17.3.6; *Kawasaki Kisen Kaisha Ltd v. James Kimball Ltd* [2021] EWCA Civ 33 at [17], [18].
39. The practical upshot of the above is that the court must consider:
- (1) whether any of the defences and counterclaims raised in the proposed amended defence and counterclaim have a real prospect of success;
 - (2) whether the evidence before the court discloses other defences, or any compelling reasons why the claim should go to trial.

Revocation of a will by marriage – legal principles

40. The general rule is that marriage revokes any will made by either party made before the marriage: section 18 of the Wills Act 1837. The section does not require that the party intends the will to be revoked by marriage, or is even aware of the rule. The testator must however be domiciled in a country where marriage has the effect of revoking a will.
41. This general rule is subject to exceptions in s.18(3) and 18(4), which materially provide:

“18. Wills to be revoked by marriage, except in certain cases.

...

- (3) Where it appears from a will that at the time it was made the testator was expecting to be married to a particular person and that he intended that the will should not be revoked by the marriage, the will shall not be revoked by his marriage to that person.

- (4) Where it appears from a will that at the time it was made the testator was expecting to be married to a particular person and that he intended that a disposition in the will should not be revoked by his marriage to that person,—
 - (a) that disposition shall take effect notwithstanding the marriage; and
 - (b) any other disposition in the will shall take effect also, unless it appears from the will that the testator intended the disposition to be revoked by the marriage.”

42. Wills which referred to a beneficiary as “my fiancée” X, or my X “my future wife” have been held to have been made in contemplation of marriage: *Re Langston* [1953] P 100; *Re Knight* (unreported but referred to in *Re Langston*). However, these words are not conclusive – a trivial gift to “my fiancé” might not be sufficient. Nor are they the only way in which the testator’s intention could be expressed.

Interpretation of the Will – legal principles

43. As to interpretation of wills, the modern principles are found in *Marley v Rawlings* [2015] AC 129 at [19] - [22]. At [19] Lord Neuberger said:

“... the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words, (a) in light of (i) the natural and ordinary meaning of those words, (ii) the overall purpose of the document, (iii) any other provisions of the document, (iv) the facts known or assumed by the parties at the time that the document was executed, and (v) common sense, but, (b) ignoring subjective evidence of any party’s intentions.”

44. These principles subsume in my judgment what is known as “the armchair principle” governing the interpretation of wills, explained in *Boyes v Cook* (1880) 14 Ch. D. 54 at 56 by James LJ:

“You may place yourself, so to speak, in [the testator’s] armchair, and consider the circumstances by which he was surrounded when he made his will to assist you in arriving at his intention.”

45. In addition, the *Marley* principles are modified in the case of wills by s.21 of the Administration of Justice Act 1982, which provides:

“21.— Interpretation of wills—general rules as to evidence.

- (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."

46. *Marley* at [25] sets out that:

- (1) section 2(1) confirms that a will is to be interpreted in the same way as a contract i.e. as summarised in [19] of *Marley* (set out at para 43 above);
- (2) in particular, section 21(1)(c) shows that "evidence" is admissible when construing a will, and that that includes evidence as to the "surrounding circumstances";
- (3) section 21(2) indicates that, if one or more of the three requirements set out in section 21(1) is satisfied, then direct evidence of the testator's subjective intention is admissible, in order to interpret the will in question.

47. Even before *Marley*, the court could in appropriate circumstances, change or supply words when interpreting a will: see *Theobald on Wills* (19th edn) at 18-044. However, the effect of *Marley* is to give the court greater freedom to do so:

"...in deciding whether there is a clear mistake, the court is not confined to reading the document without regard to its background or context. As the exercise is part of the single task of interpretation, the background and context must always be taken into consideration.

25. ... there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant."

Lord Hoffman in *Chartbrook v Persimmon Homes* [2009] UKHL 38, [2009] 1 A.C. 1101

48. Thus, although the conceptual distinction between interpretation (ascertaining the intention/meaning from the words used) and rectification (correcting the words to reflect the true intention) remains, the court may now achieve a result by interpretation which before *Marley* might only be achieved by rectification, or "rewriting the will". This is particularly significant in the case of wills, for two reasons. First, there is a longstanding line of authority (all pre-dating *Marley*) that the court cannot rewrite a will: see the cases cited in *Theobald* at 18-006, which paragraph includes an interesting discussion as to whether this proposition remains good law. That question is not, in my judgment, suitable for summary determination.

49. Secondly, until 1983², the accepted position was that the court had no power to rectify a will. As discussed below (see paras 61 to 65), s.20 of the Administration of Justice Act 1982 confers such a power, but it is limited; and Lord Neuberger in *Marley* endorsed counsel's acceptance that it would be inappropriate for the court to hold it had wider powers to rectify a will than those which are conferred by section 20.

Interpretation of the Will - discussion

50. I start by considering whether the Will is ambiguous on its face. In my judgment the defendant has a real prospect of success in showing that the expression "my last and only will" is ambiguous. In particular, the word "last" has 2 possible meanings. It can mean "most recent" to distinguish it from other earlier wills made by the testator; or it can connote that the maker of the will does not intend to make another will before her death.
51. If I am wrong about that, I consider that that expression is ambiguous in the light of the circumstances surrounding the making of the Will.
52. As to these, the following facts are either undisputed or facts which the defendant has a real prospect of establishing:
- (1) the testator (who was a vascular surgeon) knew that she was dying imminently;
 - (2) she intended the Will to be her last will, in the sense that it would be the will that would govern the disposition of her estate at her imminent death;
 - (3) the testator knew that she would enter a legal marriage the following day;
 - (4) shortly, before the civil marriage ceremony, the testator said to the defendant "Don't worry, I made my Will and I took good care of you and the children."
53. In the light of these circumstances, the defendant has, in my judgment a real prospect of showing that the expression "my last and only will" is ambiguous; and that the proper inference to be drawn from the surrounding circumstances is that the testator intended her will to survive her forthcoming marriage. Any other conclusion would defy common sense.
54. As to the actual evidence of the testator's intention:
- (1) the evidence is incomplete;
 - (2) insofar as the claimant and witnesses called on his behalf give evidence as to the testator's knowledge and intentions, the defendant is in my judgment entitled to cross examine them on those issues.

² when the Administration of Justice Act 1982 came into force

55. As to the incompleteness of the evidence, the claimant's evidence (set out above) is that Father Damian initially dictated the terms of the Will, but he does not set out what Father Damian said to him. The claimant refers to the Will being a collaboration between Father Damian and the testator; and also that she told him (the claimant) how she wished her estate to be distributed. The role of Father Damian is therefore unclear. In particular, there is no evidence as to what he said to the claimant in their initial conversation, nor as to what the testator said to him when the Will was being drafted.
56. Neither side have served a witness statement by Father Damian or a witness summary of what his evidence would be. I infer from this that he is a reluctant witness. However, the defendant intends to serve a witness summons on him to give evidence at trial. He will be an important witness as to the testator's instructions and intentions as communicated to him and to the defendant. He may also have notes or other documents, emails or WhatsApp messages that are relevant, and which he can be compelled to produce.
57. As to the evidence of the claimant and his witnesses concerning the testator's knowledge, intentions and instructions, I note the evidence of Teresa Rola (who is now the claimant's wife) on his behalf (in her trial witness statement dated 22 September 2022):

“During one of my visits to the Hospice, Evi had asked me if my late husband had left me anything in his will. I told her how his estate had been subject to inheritance tax, as it did not qualify for the spousal exemption, given that we were only religiously (not civilly) married, and that, had we have been civilly married, our marriage would have revoked his last will. While Evi made little comment about this, I am certain that she was aware of how her estate would be affected by such laws.”

and the claimant's evidence (in his trial witness statement at para 55):

“While I can only speculate, I do know that Evi knew the tax benefits of inter-spousal transfer. She may have known, or soon realised, that a civil ceremony was the only way to save the estate from the now tax-inefficient Will (which would be revoked by the marriage). Whether she was informed by her legal or social support network or hospice staff, or how or whether she was informed about the law is not known.”

58. The defendant is in my judgment entitled to test the claimant's evidence as to the testator's intentions as to disposition of her estate on her death, and to invite the court not to accept it.
59. The defendant has no pleaded case as to the factual matters set out in paragraph 55 above: neither she nor any of the witnesses called by her was present during any of the relevant

conversations. However, I do not consider that this renders her case one of “surmise and Micawberism”: see *Lady Anne Tennant v Associated Newspapers Group* [1979] F.S.R. 298. The factual matters pleaded by her are in my judgment sufficient for her to have a real prospect of success of showing that the testator intended the Will to survive her marriage to the claimant.

60. If she does succeed, then for the reasons given above, the court has the power to interpret the Will as including words that achieve that effect. One means of doing so would be to treat the reference to the claimant by his name as including the words “my fiancé”. Another would be to add after “my last and only will”, “which I intend to survive my marriage to [the claimant] tomorrow”.

Rectification - legal principles

61. As noted above, the court’s power to rectify a will derives from section 20 of the Administration of Justice Act 1982:

“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.”

62. As Chadwick J said in *Re Segelman* [1996] Ch. 171 at page 180:

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

In order to answer the first of those questions the court must admit extrinsic evidence of the testator's intentions with regard to the relevant dispositions ...”

63. As to the nature of clerical error in s.20(1)(a), Lord Neuberger in *Marley* refers to *Bell v Georgiou* [2002] EWHC 1080 (Ch) as containing the best judicial summary of the cases on this:

“The essence of the matter is that a clerical error occurs when someone, who may be the testator himself, or his solicitor, or a clerk or a typist, writes something which he did not intend to insert or omits something which he intended to insert. ... The remedy is only available if it can be established not only that the will fails to carry out the testator’s instructions but also what those instructions were.”

64. In *Marley* itself, “clerical error” was given a wide meaning:

“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”.”

65. On this basis, a solicitor’s error, when dealing with execution of a wife and husband’s wills, of giving each the other’s will to sign, was held to be a clerical error. However, it remains the case that the error must be clerical in nature. A mistake as to the appropriate legal means to achieve the result intended by the testator is not a clerical error.

Rectification - discussion

66. As noted, the defendant seeks rectification on two separate bases, each of which is said to arise from a clerical error and/or failure to understand instructions:

- (1) rectification to state expressly that the Will is made in anticipation of marriage; and/or
- (2) rectification to state expressly that the Will relates only to the testator’s English estate.

Anticipation of marriage

67. The extrinsic evidence relied upon by the defendant as showing the testator intended that the Will should endure the marriage is in substance the same as that relied upon in support of her interpretation defence; and as to which I have held she has a real prospect of showing that the testator had the intention she alleges.

68. However, in order to succeed in a rectification claim, the defendant will need to show that the failure of the Will to carry out the testator’s intentions was due either to a clerical error or a failure to understand her instructions.

69. The claimant’s counsel submitted that the defendant’s case on rectification was so implausible as to have no real prospect of success. The defendant would, he said, need to show that the testator instructed the claimant to include words which prevented the Will from being revoked by their marriage. To do so, both of them would have been aware of its significance. The defendant’s case is, he said, that despite its obvious importance, the claimant forgot or didn’t understand the testator’s instructions; and that, when the

testator came to sign the Will, she didn't notice that he hadn't included the necessary provision. The claimant's counsel relies upon the fact that the Will is short and makes no reference to marriage of any sort.

70. This submission would have more force if the claimant had been the only person involved in the preparation and execution of the Will. However, as discussed above, Father Damian played an apparently extensive role in obtaining the testator's instructions and passing them on to the claimant. Ms Rola's evidence (set out above) is that the testator was aware that marriage revoked a Will, so if she intended to marry the claimant when she made the Will, why would she go through the pointless and farcical exercise of making the Will? It is, in my judgment, implausible that she would do so. To this should be added the fact that the testator was by this stage gravely ill and physically weak; and the circumstances in which the Will was prepared and executed – at the testator's bedside, with all persons present no doubt both exhausted and in a high state of emotion. These are circumstances in which an error which might be obvious in a cool and calm setting could be overlooked.
71. In my judgment, therefore, until the court has had the benefit of cross-examination of the claimant and his witnesses, and of hearing Father Damian's evidence as to the preparation and execution of the Will, it cannot be said that the defendant has no real prospect of establishing that the claimant and/or Father Damian made a clerical error or failed to understand the testator's instructions, so that the Will failed to reflect her intentions.
72. In any event, I consider that the rectification claim should go to trial, as the evidence relating to it is effectively the same as that relating to the interpretation defence, which I have already held should go to trial.

Scope of "my estate"

73. The surrounding circumstances relied upon by the defendant in support of her submission that "my estate" should be rectified to "my English estate" are the respective values of the English estate and the testator's worldwide estate. The Will provides that 4% of the estate is for "legal fees, funeral costs and execution of the will". (I assume for present purposes that "execution of the will" refers to administration of her estate.) The defendant relies upon two factors. First, that 4% of the global estate would be £400,000, which is on its face an excessive amount for the relevant costs. Secondly, she relies upon the fact that leaving the claimant a share of her worldwide estate would increase the need for contact and potentially conflict with the testator's family, which the claimant had already expressed his apprehension about.

74. I agree that the defendant has a real prospect of arguing that these circumstances give rise to ambiguity as to the testator's intention when using the expression "my estate"; and whether they do so is not suitable for summary determination. In addition, since the defendant is, I have held, entitled to cross-examine the claimant, and to put the evidence of Father Damian before the court, that is an additional reason why this part of the counterclaim should go to trial.

Validity of the marriage

75. The established position is that:
- (1) since 1971, a marriage procured by undue influence or duress, or where one party suffers from "unsoundness of mind" is voidable, not void: section 12, Matrimonial Causes Act 1973;
 - (2) a declaration of nullity of a voidable marriage does not have retrospective effect: section 16, Matrimonial Causes Act 1973;
 - (3) a voidable marriage is therefore a marriage for the purposes of section 18 of the Wills Act 1837, even if subsequently annulled: *Roberts v Roberts* [1978] 1 WLR 653.
76. In these circumstances, the only grounds on which the defendant sought in her counsel's submissions to challenge the validity of the marriage were that:
- (1) the licence to marry granted by the Registrar General was invalid, and accordingly the marriage is invalid; and
 - (2) the court should refuse to recognise the marriage on grounds of public policy; or under the maxim *ex turpi causa non oritur actio*.

Invalid marriage licence – legal principles

77. For present purposes, it is enough to note that the formal requirements by which a valid marriage can be solemnized are provided for by the Marriage Act 1949 ("**the 1949 Act**"). Section 49 of the 1949 Act sets out grounds on which a marriage is void.
78. The general position under the 1949 Act is that marriage must take place in a register office or other approved place. The Marriage (Registrar General's Licence) Act 1970 ("**the 1970 Act**") allows for an exception to this, by providing in section 1 that the Registrar General may issue a licence for the marriage to be solemnised at another place if (and only if):

"he is satisfied that one of the persons to be married is seriously ill and is not expected to recover and cannot be moved to a place at which under the provisions of the Marriage Act 1949 ... the marriage could be solemnised"

79. Section 2 provides that in such a case notice must be given in the prescribed form (by either of the persons to be married) to the superintendent registrar of the registration district in which the marriage is to be solemnised.
80. Section 13 of the supplements s.49 of the 1949 Act by providing that a marriage for which the Registrar General’s licence is required is void if solemnised without that licence.
81. Section 3 of the 1970 Act provides, so far as relevant:

“Evidence of capacity, consent etc., to be produced.

The person giving notice to the superintendent registrar under the provisions of the foregoing section shall produce to the superintendent registrar such evidence as the Registrar General may require to satisfy him—

...

- (d) ... that the person in respect of whom such conditions are satisfied is able to and does understand the nature and purport of the marriage ceremony:
Provided that the certificate of a registered medical practitioner shall be sufficient evidence of any or all of the matters in subsection (1)(d) of this section referred to.”

82. Section 55 of the Family Law Act 1986 (“**the 1986 Act**”) provides, so far as relevant:

“Declarations as to marital status.

- (1) ...any person may apply to the High Court or the family court for one or more of the following declarations in relation to a marriage specified in the application, that is to say—
- (a) a declaration that the marriage was at its inception a valid marriage;
 - (b) a declaration that the marriage subsisted on a date specified in the application;
 - (c) a declaration that the marriage did not subsist on a date so specified;”

83. Section 58 of the 1986 Act provides, again so far as relevant:

“General provisions as to the making and effect of declarations.

- (1) Where on an application to a court for a declaration under this Part the truth of the proposition to be declared is proved to the satisfaction of the court, the court shall make that declaration unless to do so would manifestly be contrary to public policy.

...

- (3) A court, on the dismissal of an application for a declaration under this Part, shall not have power to make any declaration for which an application has not been made.
- (4) No declaration which may be applied for under this Part may be made otherwise than under this Part by any court.
- (5) No declaration may be made by any court, whether under this Part or otherwise—

- (a) that a marriage was at its inception void.
- (6) Nothing in this section shall effect the powers of any court to make a nullity of marriage order.”

84. In *Ogunware v Ogunware* [2019] EWHC 2428 (Fam), it was held that a declaration that the applicant was not married to the respondent was not a declaration that the court was empowered to make under section 55(1); and in particular, on the proper construction of s.55(1)(c), was not a declaration that a marriage did not subsist on a particular date. In addition, it was held that the court was prohibited by ss 58(3) and 58(5) from making such a declaration.
85. The effect of the above provisions is therefore, in my judgment, to prevent the defendant from having any real prospect of obtaining a declaration that the marriage was void at its inception. In case however, I am wrong about that, I turn to consider the grounds on which the defendant alleges that the marriage was invalid.

Invalid marriage - discussion

86. The defendant relies upon the facts that:
- (1) Dr O’Hanlon declined to provide a letter confirming the testator’s capacity for legal decision taking;
 - (2) the claimant did not disclose this to the superintendent registrar when giving notice of the marriage;
 - (3) instead, the claimant chose to approach Dr Monti, whom she alleges was not familiar with the testator;
 - (4) the testator either lacked capacity or would have been assessed as lacking the legal capacity to marry.

This failure by the claimant to make full disclosure, she submits, invalidated the licence granted, so that the marriage was void.

87. The starting point is whether the defendant has a real prospect of success of showing that the testator lacked capacity to marry. The test for capacity to marry is a relatively low one, as set out in Halsbury’s Laws (5th edn) Vol 72 at para 44:

“In order that a valid marriage ... be celebrated between the parties to it, it is essential that they should consent to marry one another. ...
The test to be applied is whether the person in question was capable of understanding the nature of the contract into which he was entering, or whether his mental condition was such that he was incapable of understanding it; and that in order to ascertain the nature of the contract, that a person must be mentally capable of appreciating that it involves the responsibilities normally attaching to marriage or civil partnership. There is a strong prima facie presumption that such consent has been given, as the contract is a simple one which does not require a

high degree of intelligence to comprehend. The burden of proof on a party attempting to impeach a marriage or civil partnership on the ground of want of consent is heavier than in the case of impeaching, for example, a commercial contract.”

88. I therefore reject the defendant’s submission that understanding that “the nature and purport of marriage” includes knowing that the marriage will revoke a will; although if a testator is given that information, they must be able to understand, retain, use and weigh it to have capacity to marry: see *Re DMM* [2017] EWCOP 32.
89. Bearing in mind this relatively low threshold, the only basis on which the defendant alleges that the testator lacked capacity to marry is her physical condition, and the fact that Dr O’Hanlon was not willing to provide confirmation that she had capacity for legal decision making. Capacity for legal decision making is not the same as capacity to marry, and insofar as Dr O’Hanlon may have believed that, he was mistaken.
90. The defendant indicated in the course of the hearing that she would be serving witness summonses on Dr O’Hanlon and Dr Monti, and, implicitly, that the court could not safely draw any conclusions as to the testator’s capacity to marry without hearing from those witnesses and Father Damian. However, the burden of proof is on the defendant. As noted, she was present at and a witness to the marriage. She has not identified any statements or behaviour of the testator which suggests that she was not capable of consenting to marriage. Indeed, I also note that in her witness statement dated 22 May 2023, the defendant does not say in terms that the testator lacked capacity to marry.
91. It is also clear from the hospice records that during the relevant period the testator was capable of having detailed discussions on several topics, including her religious marriage to the claimant, and the way in which she would re-arrange her furniture if she were discharged home. Finally, the defendant has not sought permission to adduce expert evidence as to whether the testator had capacity. For these reasons, the defendant does not, in my judgment, have any real prospect of showing that the testator lacked capacity to marry.
92. In those circumstances, the claimant’s omission to inform the superintendent registrar of Dr O’Hanlon’s position, whether innocent or deliberate, would not be a material omission. It is not therefore necessary to consider whether:
 - (1) the claimant was under a duty to inform the superintendent registrar of Dr O’Hanlon’s refusal to confirm the testator’s legal decision making capacity; or
 - (2) if he was under such a duty, the effect of omitting to do so, including whether it rendered the licence void, or only voidable.

There are circumstances in which it might be arguable that a marriage licence was void because it was wholly without foundation, for example, if the doctor's certificate was forged, or signed by a doctor who had not seen the patient at all. This is not that type of case.

Public policy; and/or ex turpi causa non oritur actio

93. The defendant submitted that the court has power to refuse to treat an otherwise valid marriage as being so on public policy grounds. The basis of this submission was *City of Westminster v IC* [2008] EWCA Civ 198, in which the court refused to recognise a Bangladeshi marriage on public policy grounds. I reject the defendant's submission. *Westminster* was concerned with the court's power to recognise a foreign marriage, not with the marriage's validity: see [47] and [93]. In *Westminster*, Wall LJ discusses *Roberts*, concludes that it is both binding and plainly correct, and distinguishes it from *Westminster* as having no "foreign" or private international law element.
94. The defendant also relied upon a passage in the judgment of *Hardy v Motor Insurers Bureau* [1964] 2 QB 745 at 767-768, and in particular:
- "The rule of law... - *ex turpi causa non oritur actio* - is concerned not specifically with the lawfulness of contracts but generally with the enforcement of rights by the courts, whether or not such rights arise under contract. All that the rule means is that the courts will not enforce a right which would otherwise be enforceable if the right arises out of an act committed by the person asserting the right (or by someone who is regarded in law as his successor) which is regarded by the court as sufficiently anti-social to justify the court's refusing to enforce that right."
95. The claimant in *Hardy* was the victim of an uninsured driver, who had deliberately and criminally caused him serious injury. Having obtained judgment against the driver, the claimant sought to recover the judgment sum against the Motor Insurers Bureau, who were contractually obliged (by an agreement with the Minister of Transport) to pay a third party who had obtained judgment in respect any liability statutorily required to be covered by insurance. The MIB denied liability on the ground that a contract of insurance for a deliberate criminal act was unenforceable as a matter of public policy and could not therefore be required by the relevant legislation. The Court of Appeal held that even though the driver himself was prevented because of his intentional criminal act from claiming under the policy, the injured third party was entitled to recover.
96. The facts of *Hardy* are far removed from this case. The court in *Hardy* was concerned with an existing principle of public policy, namely that no person can claim an indemnity or reparation for their own deliberate criminal act: see p760; and refining the scope of that principle. It cannot support the general proposition that the court can refuse to give

effect to a statutory provision if it considers that there are public policy reasons for doing so.

97. In *Puttick v Attorney General* [1980] Fam. 1, the court refused, on public policy grounds, to grant a declaration under s.45 of the Matrimonial Causes Act 1973 that a marriage was valid and subsisting, where the petitioner had used a false identity when entering in to it. The petitioner (whose real name was Astrid Proll), having been arrested in Germany on criminal offences including attempted murder and robbery, had “jumped bail” and come to England. She sought the declaration to enable her to become a British citizen. The marriage was held to be valid despite the petitioner’s use of a false identity and the fact that it was not genuine, in that the parties did not have a close relationship or intend to live together, and did not do so. However, the court refused to make the declaration sought, on the grounds that to do so would be permitting the petitioner to take advantage of her own criminal acts.
98. In *Puttick*, however, the court’s power to grant the declaration sought was discretionary (under section 45(1) of the MCA 1973) (and, of course, the court’s jurisdiction under CPR 40.20 is also discretionary). Although the claimant claims declaratory relief, the defendant counterclaims for a grant in solemn form of the Will (as rectified). The court is therefore required to decide whether the Will was revoked by the marriage. Section 18 does not provide that it only takes effect if it is just for it to do so or if there are no public policy reasons for it not to do so – though Parliament could have qualified its effect. It is not for the court to create a public policy exception to the operation of a statutory provision. The defendant does not in my judgment have a real prospect of success on this ground.
99. It does not however follow from this that the court should make the declarations sought by the claimant, namely that the marriage was valid at its inception, and that it subsisted when she died. I have held that the defendant has no real prospect of showing that public policy considerations prevent the court from determining the validity of the marriage for the purposes of determining whether the Will was revoked. However, that does not prevent her from relying on the matters set out in paragraph 43 of the Amended Defence and Counterclaim as justifying refusal of the declarations sought, and it cannot be said at this stage that the defendant has no real prospect of success of doing so.

Conclusions

100. For the reasons set out above, therefore:
- (1) I dismiss the application for summary judgment;
 - (2) I refuse permission to amend the Defence and Counterclaim insofar as the proposed amendments allege that the marriage is void and/or of no legal effect.

101. In addition, although the claimant's application notice is not entirely clear, it is clear from the claimant's witness statement in support of the application that he is seeking to strike out those parts of the Defence and Counterclaim that allege that the marriage is void and/or of no legal effect. In the light of my judgment, those passages are strikable, and I will also strike them out.