18 September 2014

PRESS SUMMARY

Marley (Appellant) v Rawlings and another (Respondents) (Costs) [2014] UKSC [51].
On appeal from [2012] EWCA Civ 61

JUSTICES: Lord Neuberger (President), Lord Clarke, Lord Sumption, Lord Carnwath, Lord Hodge

BACKGROUND TO THE JUDGMENT

This appeal related to wills made by a Mr and Mrs Rawlings. They each intended to make wills leaving their respective estates to the other, and, if the other had already died, to the appellant, Mr Marley. Owing to an oversight by their solicitor ("the Solicitor"), Mr Rawlings signed the will meant for Mrs Rawlings, and Mrs Rawlings signed the will meant for Mr Rawlings. The Supreme Court concluded that each will was nonetheless valid (see [2014] UKSC 2), contrary to the conclusions reached by the High Court and the Court of Appeal. As a result, the appellant inherited the estate of Mr Rawlings which was in the region of £70,000. If the will had been invalid, the respondents would have inherited the estate.

The question which now arises is how the costs of these proceedings should be borne. The appellant contends that this was ordinary hostile litigation, and the respondents should pay the appellant's costs in all three courts. The Solicitor's insurers ("the Insurers") have made submissions in support of the appellant's case. The respondents contend that all parties' costs should come out of the estate, or, in the alternative, should be paid by the Solicitor. The respondents' solicitors and counsel acted on a traditional basis in the High Court and the Court of Appeal, but in the Supreme Court were instructed on conditional fee agreements ("CFAs"), sometimes called "no win, no fee" arrangements.

JUDGMENT

In a judgment given by Lord Neuberger, the Supreme Court unanimously decides that the Insurers should pay the costs of both parties in the High Court and Court of Appeal. In relation to the costs in the Supreme Court, the Insurers should pay the appellant's costs, the respondents' solicitors' disbursements, and, the respondents' two counsels' fees, conditional on the respondents' counsel disclaiming any entitlement to their success fees under their CFA.

REASONS FOR THE JUDGMENT

The position disregarding the CFAs

If there had been no negligence on the part of the Solicitor, it would have been difficult to decide what order to make as between Mr Marley and the respondents. Where there is an unsuccessful challenge to the validity of a will, when the challenge is a reasonable one and based on an error which occurred in the execution of the will, the court often orders all parties' costs to come out of the estate**.** On the other hand, there is considerable force in Mr Marley's argument that, although these proceedings involved a reasonable dispute over the validity of a will, it was ultimately hostile litigation to which the usual rule of 'loser pays' should apply **[6]**.This would be especially true given the small size of the estate, because an order that costs were paid out of the estate would deprive Mr Marley of any benefit from the litigation **[7]**.

However, this is not a case where it could possibly be right to ignore the position of the Solicitor **[8]**. The problem in this case arose as a result of the Solicitor's negligence, and the Insurers, on behalf of the Solicitor, had required Mr Marley to bring proceedings to seek to have the will the upheld. **[9]**. The appellant has a clear claim in tort against the Solicitor, who would therefore be required, in the event that costs were ordered to be paid out of the estate, to reconstitute the estate **[11].** As the Insurers have underwritten the liability of the Solicitor, the right order to make in relation to the costs of both parties in the High Court and the Court of Appeal, and of the appellants in the Supreme Court, would be that the Insurers pay all those costs **[12-13]**.

The respondents' costs in the Supreme Court

The position in relation to the respondents' costs in the Supreme Court is complicated by the fact that their solicitors and two counsel were all instructed on CFAs. The solicitors are, in the light of the terms of their CFA, only entitled to recover their disbursements, so that must be the limit of the Insurers' liability so far as the respondents' solicitors' costs in the Supreme Court are concerned **[18]**.

As to each counsel's fees, their CFAs would appear to entitle them each to their full fee if the respondents' costs are paid out of the estate. In the light of the fact that the respondents lost, the Court considers that it would be quite wrong if their counsel recovered any success fee from the Insurers: they should be limited to their base fees **[24].** But if the order simply recorded that only counsels' base fees were to be paid by the Insurers, their 100% success fees may be recoverable from the respondents or else from the solicitors (and, if so, from the Insurers as disbursements) **[25]**. Accordingly, the Insurers will only be liable to pay the respondents' counsels' fees in the Supreme Court if both counsel disclaim their entitlement to a success fee **[26]**. Counsel subsequently confirmed that they disclaimed any entitlement which they may have under the CFAs to a success fee **[28].**

References in square brackets are to paragraphs in the judgment

22 January 2014

PRESS SUMMARY

Marley (Appellant) v Rawlings and another (Respondents) [2014] UKSC 2
On appeal from [2012] EWCA Civ 61

JUSTICES: Lord Neuberger (President), Lord Clarke, Lord Sumption, Lord Carnwath and Lord Hodge

BACKGROUND TO THE APPEALS

This appeal concerns the validity of a will. Section 9 of the Wills Act 1837 ("Section 9") contains certain formal requirements which have to be satisfied if a will is to be valid. They include the requirement that the will is in writing, that it is signed by the testator in the presence of two witnesses and that it appears that the testator intended by his signature to give effect to the will. Section 20 of the Administration of Justice Act 1982 ("Section 20") empowers the court to rectify, or correct, a will, in limited circumstances, including where the mistake is due to "a clerical error".

On 17 May 1999, Alfred Rawlings and his wife, Maureen Rawlings, were visited by their solicitor to enable them to execute wills. The wills were short and, except for the differences required to reflect the maker, they were in identical terms. Each spouse left his or her entire estate to the other, but, if the other had already died, the entire estate was left to the appellant, Terry Marley. By an oversight, the solicitor gave each spouse the other's draft will, and Mr Rawlings signed the will meant for Mrs Rawlings, and Mrs Rawlings signed the will meant for Mr Rawlings.

Mrs Rawlings died in 2003, and her estate passed to her husband without anyone noticing the mistake. However, when Mr Rawlings died in August 2006, the error came to light.

The respondents, Terry and Michael Rawlings, Mr and Mrs Rawlings's sons, challenged the validity of the will which Mr Rawlings signed ("the Will"). If it was valid, Mr Marley would inherit the £70,000, whereas if it was invalid, Mr Rawlings would have died intestate, and the respondents would inherit the £70,000.

Mr Marley began probate proceedings. The judge dismissed Mr Marley's claim on the grounds that (i) the Will did not satisfy the requirements of Section 9, and (ii) even if it had done so, it was not open to her to rectify the Will under Section 20. Mr Marley appealed to the Court of Appeal, who upheld the decision of the judge on the first ground, that the Will did not satisfy Section 9, and so did not find it necessary to consider the second.

JUDGMENT

The court unanimously allows the appeal. Lord Neuberger, with whom the rest of the court agrees, gives the majority judgment. The court holds that the Will should be rectified so that it contains the typed parts of the will signed by the late Mrs Rawlings in place of the typed parts of the will signed by Mr Rawlings.

REASONS FOR THE JUDGMENT

When interpreting a will, the court is concerned to find the intention of the testator, and it does this by adopting the same approach as it does to the interpretation of contracts, unilateral notices and patents, subject to any statutory provision to the contrary [**21-23**].

Section 21 of the Administration of Justice Act 1982 now confirms that a will should be interpreted in the same way as a contract, but indicates that, if one or more of three requirements set out in section 21(1) is satisfied, direct evidence of the testator's intention is admissible [**25**].

Mr Marley's case rested on three different contentions. The first was that the Will, properly interpreted, should be read as if it was the document signed by his wife on 17 May 1999. The second was that the extent of Mr Rawlings's knowledge and approval of the contents of the Will was such that it could be validated, albeit with deletions. The third was that the Will should be rectified to accord with Mr Rawlings's intentions [**31**]. Rectification is a form of relief which involves correcting a written instrument which does not accurately reflect the parties' true agreement or, in the case of a unilateral document, the party's true intentions [**27**]. Section 20 states that, if a court is satisfied that a will fails to carry out the testator's intentions in consequence of a clerical error, it may order that the will be rectified to carry out those intentions [**29**].

Interpretation
Whether a particular approach is one of interpretation or rectification is an important, and sometimes difficult and controversial, issue, but only limited argument was directed to this point on this appeal. As the court considers that this appeal succeeds on the ground of rectification, it proceeds on the basis that it fails on interpretation [**41**].

Deletions
The court rejects the contention that the Will can be treated as a valid will by reference to the principle that it can, in some circumstances, make deletions to a will. It is inappropriate to invoke this principle to justify selecting phrases and provisions for deletion from a will, intended to be signed by someone else, to enable the will to comply with the testator's intentions [**47**].

Rectification
It is unchallengeable that Mr Rawlings signed the Will and that he did so with the intention of it being his last will and testament. The Will is unambiguously intended to be a formal will and was signed by Mr Rawlings, in the presence of two witnesses, on the basis that it was indeed his will [**57**]. It is clear from the provisions of Section 9 that the fact that a will may face problems in terms of interpretation or even validity does not mean that it cannot satisfy the formality requirements [**58**]. As it was Mr Rawlings who signed the Will, it can only have been his will, and it is he who is claimed in these proceedings to be the testator for the purposes of Section 9. There can also be no doubt from the face of the Will (as well as from the evidence) that it was Mr Rawlings's intention at the time he signed the Will that it should have effect as his will; consequently Section 9 is satisfied [**59**].

A document does not have to satisfy the formal requirements of Section 9 before it can be treated as a "will" capable of being rectified pursuant to Section 20 [**60**]. It is enough that it was intended to be a will. The expression 'clerical error' in Section 20 carries the relatively wide meaning of a mistake arising out of office work of a relatively routine nature, such a preparing, filing, sending, or organising the execution of, a document, rather than the relatively narrow meaning of a failure in transcription [**76**].

Consequently, the Will falls within, and can be rectified under, Section 20 [**86**].

Lord Hodge saw no reason in principle why, under Scottish law, the remedy of partial reduction and declarator should not be available to cure defective expression in a will [**91**].

References in square brackets are to paragraphs in the judgment