

# 5 Stone Buildings

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## Will rectification: an update

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# Topics

2 recent cases:

- *Kelly v Brennan* [2020] EWHC 245 (Ch)
- *Barrett v Hammond* [2020] EWHC 3585 (Ch)

# Section 20 AJA 1982

*20.— Rectification.*

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

*(a) of a clerical error; or*

*(b) of a failure to understand his instructions,*

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

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

*((3): PR protection; (4) & (5): exclusion of certain grants)*

# *Re Segelman* [1996] Ch 171

3 questions:

1. What were the testator's intentions with regard to the dispositions in respect of which rectification is sought?
2. Is the will so expressed that it fails to carry out those intentions?
3. Is the will 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?

# *Kelly v Brennan* [2020] EWHC 245 (Ch)

12 February 2020, Master Shuman

- Dec born in Ireland in 1934
- One of 9 children
- Moved to England in early 1970s and never returned to live in Ireland, though visited
- Never married and had no children
- Aug 2006: Dec gave will instructions to long-standing Irish sols

## *Kelly v Brennan* [2020] EWHC 245 (Ch)

- 2010: Dec bought a flat in West London
- 5 July 2010: Dec gave same Irish solicitors instructions for new will
- Had 6 living siblings, 2 (James and Maureen) having predeceased
- Attendance note:

*Residue including English Property to sister, Eileen Delaney, Kathleen Kelly (wife of decd brother James) brothers, Michael;, Vincent & John and the children of his deceased sister Maureen Brennan, namely*

*Mary, Matthew, Fergus, Vincent, and Damien Brennan in equal shares, subject only to payment of my debts etc. By equal shares I mean one-sixth to each of my siblings and remaining one-sixth equally between children of Maureen Brennan, decd.*

## *Kelly v Brennan* [2020] EWHC 245 (Ch)

- Same day (5 July 2010): will executed. Gifted land in Ireland to 2 nephews, and residue to:

*my sister, Eileen Delaney, my sister in law, Kathleen Kelly (wife of my deceased brother, James Kelly) and my brothers, Michael Kelly, John Kelly and Vincent Kelly and my niece Mary Brennan and my nephews, Matthew, Fergus, Vincent and Damien Brennan (the children of my deceased sister, Maureen Brennan) in equal shares absolutely subject only to the payment of my debts, funeral and testamentary expenses.*

## *Kelly v Brennan* [2020] EWHC 245 (Ch)

- 9 June 2014: Dec died aged 80
- 7 Nov 2014: English grant of probate issued to C; estate c.£1.6m
- 7 May 2015: 6 months from grant
- 25 Apr 2016: Irish grant of probate issued to C; Irish estate c.€80k
- 1 May 2018: claim issued (just under 3 years after expiry of 6-month period)
- Brought by one brother as B (though also executor) against 5 children of Maureen; opposed by 2 of them



# *Kelly v Brennan* [2020] EWHC 245 (Ch)

## Issues for Court:

- Could English court rectify an Irish will?
- Was error clerical?
- Should permission be granted to bring claim out of time?

## *Kelly v Brennan* [2020] EWHC 245 (Ch)

Could English court rectify an Irish will? Yes (on facts)

- s.77(1)(c) AJA 1982 provides: *sections 17 to 22 extend to England and Wales only*
- But: distinction between extent and application of an Act:
  - Extent is the geographical area throughout which it is law; jurisdictions which it forms part of the law of
  - Application concerns the ‘people, places and things’ to which an Act applies; when it has a practical effect

## *Kelly v Brennan* [2020] EWHC 245 (Ch)

- No previous authority or specific guidance on will rectification in Dicey or Theobald
- *In terms of the best fit I consider that rectification is more obviously analogous to the examples given in respect of essential validity*
- Issues of material or essential validity are governed:
  - movables: law of testator's domicile at death
  - immovables: lex situs

## *Kelly v Brennan* [2020] EWHC 245 (Ch)

- Dec was domiciled in England
- *Here the 2010 will has been admitted to probate in order to give effect to the deceased's testamentary intention. I am concerned with the application of the 1982 Act to the administration of the estate in England. This is also consistent with wider principles of private international law and the autonomy of the deceased in selecting England as his country of domicile. It therefore makes sense for the law of the deceased's domicile to determine issues of essential validity and construction, in respect of movables, including this claim for rectification.*

## *Kelly v Brennan* [2020] EWHC 245 (Ch)

NB:

- Common ground the rectification claim did not affect the gift of the Irish (immovable) property
- Residue appears to have been characterised as ‘moveable’ even though comprised English investments *and* London flat
- On facts, made no difference; but ? if rectification had affected gift of the Irish immovable property

## *Kelly v Brennan* [2020] EWHC 245 (Ch)

Was error clerical? Yes

- *Marley v Rawlings*: expression ‘clerical error’ should be given a wide meaning
- *Unfortunately there was a clerical error when the 2010 will was typed up. It should have recorded that the residue was to be divided into six equal shares and then identify the beneficiaries to whom those shares were to be divided. Instead the 2010 will simply listed all 10 of the beneficiaries and then added “in equal shares absolutely”. The effect of that was to divide the residue*

## *Kelly v Brennan* [2020] EWHC 245 (Ch)

*into 10 shares and not six. I do not know whether the error occurred in Cyril Osborne's dictation of the will instructions to Brona Osborne or as she typed up the will. It is plain that a mistake arose that was not corrected when the 2010 will was executed. I accept Mr Bowmer's submission that this was a clear clerical error arising out of office work and that it is a strong case for rectification of the 2010 will.*

## *Kelly v Brennan* [2020] EWHC 245 (Ch)

Should permission be granted to bring claim out of time? Yes

- *Chittock v Stevens*: apply by analogy the ‘factors’ relevant to s.4 of 1975 Act
- But had suggested caution: *While a claim under the 1975 Act for provision out of the estate is one to overrule or derogate from the testator's intentions a claim for rectification is concerned to ensure the proper implementation of his wishes.*



## *Kelly v Brennan* [2020] EWHC 245 (Ch)

Caution endorsed:

*To simply align the guidelines from applications under section 4 of the 1975 Act to applications to extend time under section 20(2) of the 1982 Act is to disregard the fundamentally different nature of these claims. The former can effectively drive a coach and horses through testamentary intention whereas the latter seeks to find the true testamentary intention and give effect to it by rectifying the will. Whilst noting that section 20(3) of the 1982 Act is analogous to section 20 of the 1975 Act I do consider that section 20 of the 1982 Act is and should be more flexible than the 1975 Act.*

## *Kelly v Brennan* [2020] EWHC 245 (Ch)

*That is demonstrated in the more flexible approach to the meaning of section 20(1)(a) of the 1982 Act as set out by the Supreme Court in *Marley v Rawlings*. *Theobald on Wills*, 18th edition, paragraph 14-010 also makes the additional point that there are practical reasons for the flexibility. A rectification claim is often an alternative to a claim for a declaration as to the true meaning of a will. The latter has no time constraints and significantly no protection for the executor. There is a potential risk that if there was too restrictive approach to the time limit under section 20 of the 1982 Act a court may, in trying to achieve a result where the will truly*

## *Kelly v Brennan* [2020] EWHC 245 (Ch)

*reflected the testamentary intentions, strain too far in in interpretation.  
That could lead to an executor being exposed many years later for  
distributing on the wrong basis.*

## *Kelly v Brennan* [2020] EWHC 245 (Ch)

A further point:

- s.21 AJA not engaged (as will not meaningless not ambiguous), so construction claim would not have helped
- BUT could have omitted the words “in equal shares absolutely” under (limited) common law jurisdiction to omit words from probate, and thereby create the ambiguity which could be resolved by construction

## *Kelly v Brennan* [2020] EWHC 245 (Ch)

*I consider that it would have been open to Vincent on the first category identified by the committee to argue that the 2010 will could have been rectified, in the common law sense, by the removal of the words “in equal shares absolutely”. That would have led to an ambiguity and as a matter of construction the court could have admitted evidence of the deceased’s testamentary intentions to cure this ambiguity. The claim form sought “such further or other relief as the court thinks fit” and Mr Bowmer submitted that if I refused the claim for rectification under section 20 of the 1982 Act I could grant relief via this somewhat more circuitous route: I*

## *Barrett v Hammond* [2020] EWHC 3585 (Ch)

6 November 2020, HHJ Kramer (sitting as a High Court Judge)

- 29 Sep 1998: Dec made will by which he gave residue to be divided into 52 parts, of which 6 named individuals should receive 6 parts each (viz. 36 parts in total), and 8 charities should receive 2 parts each (viz. 16 parts in total)
- 2 Aug 2005: Dec made codicil: (a) deleted gift to 2 of the individuals (viz. 12 parts) and (b) gifts 2 parts each to 2 additional charities (viz. 4 parts in total)
- BUT: 8 parts undisposed of

## *Barrett v Hammond* [2020] EWHC 3585 (Ch)

*Will: to divide the remainder of my residuary estate, and to stand possessed thereof, to divide the same into fifty-two parts upon trust (1) as to six parts for Sydney Arthur Higgs; (2) as to six parts for Lesley Gordon Higgs; (3) as to six parts for Ellen known as Eileen Gertrude Higgs; (4) as to six parts for the said John Lesley Higgs; (5) as to six parts for Catherine Mary Hammond; and (6) as to six parts for Elizabeth Anne Barrett, provided always that in the event of any of the foregoing bequests of my residuary estate failing, then that part shall accrue to the other foregoing part or parts, and if more than one in the proportions which they bear to each other.*

~~Then another eight sets of two parts to go to the charities~~

## *Barrett v Hammond* [2020] EWHC 3585 (Ch)

Codicil:

*(i) My will shall be construed and take effect as if (i) clauses 8(k), 9(i) and 9(iii) of my will shall be deleted in their entirety.*

*(ii) The following bequest shall be added to clause 9 of my will. As to two parts for the Royal Institution of Great Britain of 21 Albemarle Street London; (b) as to two parts for the Dogs Trust [address] [...]*

*In all other respects, I confirm my will.*



## *Barrett v Hammond* [2020] EWHC 3585 (Ch)

- 1 March 2016: 2<sup>nd</sup> codicil: changed appointment of executor and directions re burial
- Sole executrix brought construction and rectification claim
- Latter stayed pending determination of the former
- Master Kaye decided that on true construction a partial intestacy arose in relation to 8 of the 52 parts
- So *“question as to whether there is scope to rectify in this case is really determined by my finding as to the testator's intentions, because the*

## *Barrett v Hammond* [2020] EWHC 3585 (Ch)

- *will has already been construed by Master Kay. If it was his intention to dispose of the whole of his estate, and not to leave a partial intestacy as to those eight parts, the will certainly does not carry out those intentions”*
- Lots of evidence that Dec did not intend a partial intestacy - and *Re Harrison* (“when a testator has executed a will in solemn form, we must assume that he did not intend to make it a solemn farce”)
- Does s.20 apply to codicils? Says “will”

## *Barrett v Hammond* [2020] EWHC 3585 (Ch)

*In the course of the hearing, I had to look a little further into the law as there was a question as to whether the Administration of Justice Act could amend a codicil. It is quite clear from s.1 of the Wills Act 1837 that the definition of "will" includes a codicil, so although Williams on Wills assumes that it can be used to rectify a codicil, if one needed authority for that proposition, it comes from the fact that a "will" includes a codicil for the purposes of the 1837 Act. There is no other definition of "will" in the Administration of Justice Act 1982, so for will we can read "including codicil."*

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## *Barrett v Hammond* [2020] EWHC 3585 (Ch)

- ‘Mechanics’ of rectification of a codicil: *The effect of confirmation of the will, which appears in both the 2005 and in the 2013 codicils, had the effect of bringing the disposition of the will down to the date of the codicil, as if a new will had been made, and amounts to a republication of the will. As the codicil is annexed to the will, the two are to be construed as one testamentary disposition.*
- Error was a clerical error (*Marley v Rawlings*): *In this case what the solicitor needed to do was to appreciate that unless something was done about the number of parts into which the residuary estate had*

## *Barrett v Hammond* [2020] EWHC 3585 (Ch)

- *been split, there was going to be a partial intestacy. The fact that the solicitor did not apply his mind to it is evident from the letter which he sent with the draft codicils, which made no reference to the mismatch. That is something I would expect to appear in a letter*
- *Whilst there was a carveout for the exercise of specialist services to be found in Marley which would more properly fall under s.20(1)(b) of the 1982 Act, rather than within the category of clerical errors under 20(1)(a), there is nothing particularly specialist about appreciating that if one starts with fifty-two shares but only dispose of forty-four of them, eight of them remain undisposed of.*

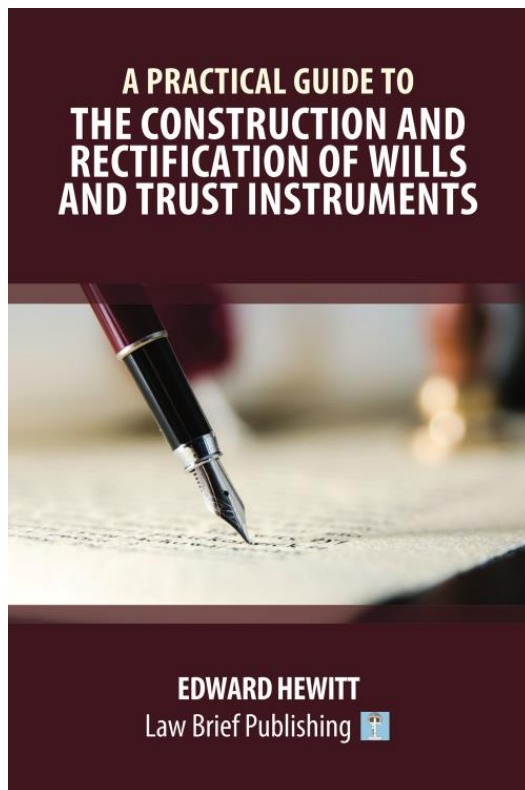
## *Barrett v Hammond* [2020] EWHC 3585 (Ch)

- *The reconciliation of the figures did not require any particular legal expertise and does not point to a misunderstanding as to the instructions. It was just a clerical oversight, a failure to balance the figures so that at the end of the day the number of shares disposed of coincided with the total of the parts.*
- *The way this can be achieved, given that the codicil can be rectified, is to put it into the form it should have been had the solicitor paid sufficient attention to the impact of the change wrought by the codicil, namely to add words to the codicil to reflect the change in the number*

## *Barrett v Hammond* [2020] EWHC 3585 (Ch)

- *of parties amongst whom the shares were to be distributed. That can be done by rectifying clause 9 [NB of the will] so that it reads, "Subject thereto, to divide the remainder of my residuary estate, and to stand possessed thereof, to divide the same into-- ", and then delete "fifty-two parts", and insert "forty-four parts".*

## *Further reading...*



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Thank you

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