After *Marley*

Mike Muston reviews a case which indicates that the courts will take a 'common sense' approach to construction and rectification

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'The case of *Millar* provides further confirmation, following on from the Supreme Court decision in *Marley*, that courts will approach cases of construction and rectification on a practical and common-sense basis.'

The case of *Millar v Millar* [2018], which came before the High Court in Bristol earlier this year, saw the court considering an application made as to the construction of a family settlement, or, in the alternative, its rectification, in circumstances where a 'boilerplate' clause had been inserted into the settlement erroneously. In considering the application, HHJ Matthews was able to find for the claimants on construction alone, through applying principles well established in contract law, which he deemed equally applicable to the law of wills and trusts.

Background

The claimants, Christina Millar and Sarah Pearson, were the daughters of the late Christopher Pearson and his wife, Janet Pearson. Mrs Pearson died on 1 July 2005 and Mr Pearson on 30 March 2015. The issues that arose in this matter came to light during the course of Mrs Millar and Miss Pearson seeking to deal with the administration of their late father's estate.

Prior to her death, Mrs Pearson jointly owned her home with her husband as tenants in common in equal shares. Upon Mrs Pearson's death, her share in the matrimonial property was left by her will to her two daughters – thus resulting in Mr Pearson becoming the sole legal owner of the property, but holding the beneficial interest on trust as to 50% for himself and 25% each for his two daughters.

Following Mrs Pearson's death, the family took legal advice as to the possibility of limiting adverse tax consequences potentially arising from the distribution of Mrs Pearson's estate under her will. Ultimately, it was agreed by Mrs Millar and Miss Pearson that they would enter into a trust which would seek to take advantage of the 'reverter to settlor' exemption available at the time and the beneficial tax position that this would bring with it. They entered into this arrangement by way of a settlement dated 7 December 2005 (the settlement).

As it happens, owing to the subsequent introduction of the Finance Act 2006, the reverter to settlor exemption became no longer available. However, this was not an issue which the court needed to consider in this matter. The principal issue was the inclusion of a clause (clause 13) which appeared to defeat the entire purpose of creation of the settlement.

Within clause 4 of the settlement, the beneficial interest in the former matrimonial property then held by Mrs Millar and Miss Pearson was to be held by them initially upon trust for their father during his lifetime. Upon their father's death, under clause 4.2, the interest was then to revert to Mrs Millar and Miss Pearson, such that they would pay the income to themselves during their lifetimes. There were then further provisions regarding the payment of income to any spouses of Mrs Millar and Miss Pearson following their own deaths and, upon expiration of the trust period, provisions requiring the trustees to hold both the capital and income for the benefit of Mrs Millar and Miss Pearson or their surviving issue.

As commonplace with reverter to settlor trusts, however, clause 5 of the settlement provided Mrs Millar and Miss Pearson with powers of appointment in relation to the trust fund for the benefit of the various family members named within the settlement, including themselves.

Clause 6 of the settlement then provided for a gift over to a charity or charities, but only in the event of 'failure or determination' of the aforementioned trusts.

The issue which arose upon subsequent review of the settlement following Mr Pearson's death was that clause 13 of the settlement provided that:

> ... no provision of this Deed shall operate directly or indirectly, so as to cause or permit any part of the capital or income of the Trust Fund to become in any way payable to or applicable for the benefit of the Settlor [being Mrs Millar and Miss Pearson] or any person who shall previously have added property to the Trust Fund or the spouse for the time being of the Settlor or any such person.

It was further noted that the prohibition in clause 13 was to apply 'notwithstanding anything else contained or implied' within the settlement.

Accordingly, in denying Mrs Millar and Miss Pearson the ability to benefit from the settlement, including the principal benefit of being able to appoint the trust fund in favour of themselves following their father's death, clause 13 seemed clearly contradictory to the intended purpose of the settlement. While, as noted by HHJ Matthews, a clause such as clause 13 might commonly be included within a settlement to prevent undesirable tax consequences that may result from an accidental resulting trust arising in favour of a settlor, the deliberate intention here was for Mrs Millar and Miss Pearson to create a reverter to settlor trust.

As it happened, all living beneficiaries of the trust were over 18 and willing to provide their consent to the application. Consent was also obtained from the Attorney General on behalf of the unnamed charities. However, given the simple reference in clause 4.2 to 'issue', the position of unborn children would need to be considered, and given also the need for Mrs Millar and Miss Pearson to address matters with HMRC, it was not possible simply to reach an agreement between all those parties potentially affected. Accordingly, the approval of the court was required.

In the view of HHJ Matthews there was no doubt that the common law principles developed in relation to the interpretation of commercial contracts applied equally to the interpretation of wills and trusts.

It was therefore upon this basis that an application was made seeking permission to construe the settlement as if clause 13 were of no effect, or, alternatively, that the settlement be rectified through the removal of clause 13 entirely.

Case law considered

In the view of HHJ Matthews there was no doubt that the common law principles developed in relation to the interpretation of commercial contracts applied equally to the interpretation of wills and trusts.

Reference was made within the judgment to the comments of Lord Hoffman in *Investors Compensation Scheme v West Bromwich Building Society* [1997], who summarised what he saw as the common-sense basis upon which issues of interpretation should be addressed, rather than with reference simply to a 'legal interpretation'. In particular, he noted the following points for consideration:

- How would a reasonable person, having all background knowledge available to the parties at the time of entering into the contract, interpret the meaning of the document?

- Background knowledge should include anything which would affect the way in which the language of the document might be understood by a reasonable man.

- However, background knowledge should not include the subjective intent of the parties, nor the content of their previous negotiations.

- The meaning of the document should be defined as what the parties using the specific words, against the relevant background, would reasonably have intended them to mean. Using the relevant background information the reasonable person might conclude that the parties must, for whatever reason, have used the wrong words.

- While the proposition that words should be given their 'natural and ordinary meaning' remained appropriate, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had.

HHJ Matthews then went on to consider the cases of *Staden v Jones* [2008] and *Marley v Rawlings* [2014] in relation to which, respectively, the Court of Appeal applied those principles of construction to find in favour of the alleged creation of a trust and the Supreme Court applied the principles in relation to the construction of a will.

With regard to the well-publicised case of *Marley*, involving the married testators who each mistakenly signed

the will in the name of the other spouse, rather than their own, Lord Neuberger held that the approach adopted by the courts in relation to the interpretation of contracts should be the same as the approach to interpreting wills. Lord Neuberger continued that, regardless of whether the document before the court was a contract or a will:

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> ... the aim is to identify the intention of the party or parties to the document by interpreting the words used in their documentary, factual and commercial context.

A major difference, of course, between a contract and a will is that a will is made by a single party, whereas a contract is agreed by a number of parties. Nevertheless, in circumstances where the court already adopted contractual construction principles in relation to unilateral notices, Lord Neuberger held in *Marley* that there seemed no basis for not also applying such principles to wills.

Judgment

Taking the above judicial commentary into consideration, HHJ Matthews saw:

> ... no reason to suppose that the construction of a family trust deed, often again a unilateral document, should be construed along different lines.

Accordingly, he duly applied the well-established principles of construction of contracts to his review of the settlement entered into by Mrs Millar and Miss Pearson.

First, the judge noted clauses 4.2 and 13 simply could not stand together – they were directly contradictory with one another. The question, therefore, was which clause should stand and which one should give way to the other.

A slight complicating factor in this exercise was the inclusion of clause 6 within the settlement, which provided for the gift over to charity. HHJ Matthews felt that, without this clause, it was clear that the operation of clause 13 would simply produce a resulting trust for the settlors, as the interests under clause 4.2 could not take effect. Accordingly, it would seem clear in those circumstances that clause 13 should be ignored. Nevertheless, when considering the impact of the clause providing for the gift over to charity, HHJ Matthews determined that clause 6 was not a stand-alone clause, but one that would only come into effect if the earlier clause 4.2 could not. Specifically, the gift over to charity would only take effect in circumstances where it was not possible to achieve the primary intention which was to benefit members of the Millar/Pearson family.

In light of this, HHJ Matthews held that clause 6 could not take effect if clause 13 were to preclude the Millar/Pearson family from benefiting from the trust, which (as would be the case were there no clause 6 at all) would mean a resulting trust arising in favour of Mrs Millar and Miss Pearson. That being the case, it was held that allowing clause 13 to stand, and leaving Mrs Millar and Miss Pearson seeking to claim outside of the settlement under a resulting trust, was an entirely perverse position. Accordingly, upon true construction of the settlement, and applying a sensible and pragmatic approach, it was clear that clause 13 should be disregarded completely.

While, strictly speaking, HHJ Matthews was not required then to consider the alternative claim in rectification, he elected to do for the sake of completeness, considering a scenario where he might not have been able to find for the claimants upon their construction claim. Perhaps unsurprisingly, in circumstances where the judge had already found that there was a clear intention that Mrs Millar and Miss Pearson wished to create a settlement whereby their interests in their parents' former matrimonial property reverted to them upon the death of their father, it was appropriate that clause 13, which was inconsistent with that intention, should be removed by way of rectification.

Conclusions

The case of *Millar* provides further confirmation, following on from the Supreme Court decision in *Marley*, that courts will approach cases of construction and rectification on a practical and common-sense basis. While the 'reasonable man' (having been advised of the effects of the clauses in the document) might see the mistake as clear and simple, the reality of rectifying such mistake is sometimes far from that position.

It was also helpful in this case that it was possible to make the application with the consent of the living family members and the Attorney General on behalf of the unnamed charities. This meant the judge felt able to determine the matter on the papers alone without the need for a hearing, no doubt saving significant cost, particularly in circumstances where the judge felt able to make his order without the need for unborn children to have additional representation. Accordingly, should issues of construction arise in the future but, for technical reasons, it is not possible simply to resolve the matter by agreement, prospective claimants may be able to feel less daunted about the time and expense involved in pursuing such an application, should the position of the majority of the parties be aligned. ■

Investors Compensation Scheme v West Bromwich Building Society
[1997] UKHL 28
Marley v Rawlings
[2014] WTLR 299
Millar & anor v Millar & ors
[2018] WTLR 563
Staden v Jones
[2008] EWCA Civ 936

Ashes to ashes

Disposal of a corpse: who has the right to decide after death? Amy Berry explains

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'Judge Boggis QC confirmed that the factual matrix is relevant as are the views of all sides and the wishes of the deceased, but that ultimately the court is required to find a solution which does fairness and justice to both sides.'

The fraught difficulty of who has the right to choose how the body of a deceased person is to be disposed of, who owns the ashes and/or where it is to be buried are only rarely issues for the courts to decide because either the family are happy to agree, or the deceased left a will and gave directions for their executors to carry out.

The reality of the law governing the disposal of human remains is often at odds with the expectations of families and relatives who have lost loved ones. The law is based on stark rules which can be difficult for those grieving to accept. Managing expectations is important.

Who owns the corpse?

There is no property in a corpse (*Williams v Williams* [1882]). A corpse is incapable of being the subject of property transactions or offences; for example, it cannot be bought or sold, stolen or criminally damaged, or seized by the deceased's creditors as security for their debts (*R v Fox* [1841]).

Where can I cremate?

Cremation in a crematorium, provided it does not amount to a public nuisance (*R v Price* [1884]), has a statutory footing under the Cremation Acts 1902 and 1952. The definition of a crematorium was extended in *R (on the application of Ghai) v Newcastle City Council* [2010] where the Court of Appeal held that cremation on an open-air funeral pyre within a walled enclosure was capable of being construed as being within 'a building', aka a crematorium.

Are the deceased's own wishes determinative?

The deceased's wishes following the Human Rights Act 1998 became relevant or it is arguable that they did. In *Borrows v HM Coroner for Preston* [2008], Cranston J found that it was clear from the jurisprudence of the European Court of Human Rights that the views of a deceased person as to funeral arrangements and the disposal of his or her body must be taken into account in accordance with Art 8 – the right to private and family life.

In *Ibuna v Arroyo* [2012], where Congressman Arroyo of the Philippines who had been suffering from liver complaints since 2006 had travelled to England for treatment and died here, there was a dispute between the cohabitee and estranged wife as to who had the right to take possession and make arrangements for the disposal of the body. Peter Smith J disagreed with the analysis in *Borrows*, finding that the Human Rights Act 1998 cannot be applied post-death in relation to a body and preferring the position that, in disposing of the body, the executor is entitled to have regard to the expressions made by the deceased but is not bound by them, as set out by Hale J as she then was in *Buchanan v Milton* [1999] at 845H:

> There is no right of ownership in a dead body. However, there is a duty at common law to arrange for its proper disposal. This duty falls primarily upon the personal representatives of the deceased (see *Williams v Williams* (1881) 20 ChD 659; *Rees v Hughes* [1946] KB 517). An executor appointed by will is entitled to obtain possession of the body for that purpose (see *Sharp v Lush* (1879) 10 ChD 468, 472; *Dobson v North Tyneside Health Authority and Another* [1997] 1 FLR 598, 602, obiter) even before the grant of probate. Where there is no executor, that same duty falls upon the administrators of the estate, but they